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In the
Supreme Court of the United States

STEVEN DWORKIN, KRISTEN HENRY,
ROXY HAYES, and KAREN MILLS,
Petitioners,

v.

JOHN F. TAMBURO, doing business as MAN'S BEST
FRIEND SOFTWARE, and VERSITY CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a court should apply the standard adopted by the majority of U.S. Courts of Appeals (as originally articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) or the standard still used by the U.S. Court of Appeals for the Seventh Circuit (resorting to principles articulated in *Calder v. Jones*, 465 U.S. 783, 789-790 (1984) nearly 30 years ago prior to the *en masse* public availability and use of the Internet) when determining whether specific personal jurisdiction exists over a defendant for an alleged intentional tort that occurred solely on the Internet.

2) Whether the "expressly aimed" prong of the *Calder* "effects" test is satisfied solely by finding that an alleged injury occurred in the forum state or if "something more" is required to establish personal jurisdiction. *Calder v. Jones*, 465 U.S. at 789-780; *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (en banc).

PARTIES TO THE PROCEEDINGS

The Petitioners are Steven Dworkin, Kristen Henry, Roxy Hayes, and Karen Mills. The Petitioners are four of the five Appellees below.

The Respondents here and the Appellants below are John F. Tamburo, d/b/a Man's Best Friend Software, and Versity Corporation.

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Steven Dworkin, Kristen Henry, Roxy Hayes, and Karen Mills respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 601 F.3d 693 (7th Cir. 2010) and is reproduced in the Appendix herein at 1a-32a. The opinion of the District Court granting Petitioners' motion to dismiss is reported at 2007 U.S. Dist. LEXIS 75913 (N.D. Ill. Oct. 9, 2007) and is reproduced in the Appendix herein at 42a-65a.

JURISDICTION

The Court of Appeals entered its judgment on April 8, 2010. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Due Process Clause of the Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

735 ILCS 5/2-209(c)

A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

STATEMENT OF THE CASE

A. Introduction

This case concerns the continuing evolution of the Minimum Contacts Doctrine in the realm of personal jurisdiction and, specifically, its applicability to cases involving contacts between parties occurring solely via the Internet. This Court articulated what has become known as the Minimum Contacts Doctrine in *International Shoe Co. v. Washington* when it held that, "in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

The Doctrine continues to evolve as technology advances and courts, including this Court, develop standards and tests to evaluate personal jurisdiction in novel circumstances falling outside the original parameters of *International Shoe*. With respect to the issues in this case, lower courts, including nearly all of the U.S. Circuit Courts, have developed varying standards and tests to address personal jurisdiction where the contacts between persons and forums occur solely on the Internet without any physical interaction.

This case involves two divergent tests developed for such situations: the test originally articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-24 (W.D. Pa. 1997) and since adopted by the majority of the Circuit Courts, on one hand, and the Seventh Circuit's forced application of principles articulated nearly thirty years ago in *Calder v. Jones*, 465 U.S. 783 (1984) to the Internet, on the other hand. This Court has not yet addressed this issue. Given the split between the Circuits, this case presents a ripe opportunity for this Court to establish a universal standard for addressing personal jurisdiction issues arising solely from electronic communications through the Internet.

As the Internet expanded and allowed individuals from one state to easily communicate about and with individuals in other states and countries, and allowed individuals to engage in commercial transactions with companies located in other states or countries without leaving their homes or communities, it became necessary to re-evaluate the Minimum Contacts Doctrine in the context of the Internet and electronic communications and commerce. Indeed, as one of the first courts to address these issues, the Western District of Pennsylvania in 1997 recognized the Internet age as a "global revolution" and that "the development of the law concerning the permissible scope of personal jurisdiction based on Internet use [was] in its infant stages." *Zippo Manufacturing Co.*, 952 F. Supp. at 1123.

In *Zippo*, the court had to determine whether the activities of a business through its website constituted sufficient minimum contacts with Pennsylvania to exercise personal jurisdiction over the business. *Id.* at 1126. In doing so, the court created a "sliding-scale" analysis for personal jurisdiction that focused on the "nature and quality of commercial activity that an entity conducts over the Internet" and the level of interactivity of the business' website. *Id.* at 1124. One end of the *Zippo* scale constitutes passive websites that simply convey information to those interested in it. *Id.* The opposite end of the scale constitutes commercial websites that clearly allow business to be transacted over the Internet. *Zippo*, 952 F. Supp. at 1124. The *Zippo* court described the middle of the scale as occupied by those websites that allow users to exchange information with the host computer. *Id.* The court held that, "[i]n these cases, jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.*

Since *Zippo*, the Circuit Courts have reached conflicting decisions regarding which situations, if any, the sliding-scale analysis should be applied. The majority of the Circuit Courts have adopted a standard that is consistent in both application and in contrast to the strained approach employed by the Seventh Circuit below.

In the instant case, the Seventh Circuit declined to adopt a jurisdictional test specifically for Internet-based cases, noting that the test laid out in *Calder* "speaks directly to personal jurisdiction in intentional-tort cases . . . [and] can be applied to cases involving tortious conduct committed over the Internet." Pet.

App. 17a; *Tamburo v. Dworkin*, 601 F.3d 693, 703 (7th Cir. 2010). In its opinion, the Seventh Circuit held that the district court improperly applied the *Zippo* sliding-scale analysis even though the Defendants' only contact with Illinois for purposes of specific personal jurisdiction occurred over the Internet and the Defendants never physically entered Illinois or sent any tangible goods to Illinois. Pet. App. 17a-18a.

In *Calder*, the publisher of a national magazine located in Florida published a defamatory article about the plaintiff, a film and television star living and working in California. *Calder,* 465 U.S. at 785. In addressing California's exercise of personal jurisdiction over the petitioners, this Court focused its analysis on the interaction between the defamatory conduct and the forum state. *Id.* at 788-90. As a result, the Court held that, "California is the focal point *both of the story and of the harm suffered.*" *Id.* at 789 (emphasis added). Thus, California had personal jurisdiction over the petitioners based on the "effects" of the harm suffered. *Id.* In establishing the *Calder* "effects" test, this Court noted that jurisdiction was appropriate when the defendant's actions, or conduct in question, were "expressly aimed" at the forum state. *Id.*

In direct conflict with the Seventh Circuit's reliance upon *Calder*, the Fifth Circuit applied the *Zippo* test to a similar Internet-based defamation case. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002). *Revell* involved a claim for defamation that took place solely on the Internet. *Id.* at 469. The plaintiff argued that the court should apply the *Calder* "effects" test to determine personal jurisdiction since the claim was based on an intentional tort. *Id.* at 473. The court, however, chose to use the *Zippo* "sliding-scale" test, reasoning that Internet-based defamation was similar to online business torts and that the *Zippo* test did not conflict with the "effects" test for intentional torts. *Id.* at 471-72. Indeed, the Fifth Circuit identified the *Zippo* test as the proper method of "determining whether the operation of an internet site can support the minimum contacts necessary for the exercise of personal jurisdiction." *Id.* at 470.

As the use of the Internet by individuals and businesses continues to grow exponentially for purposes ranging from the exchange of private electronic communications to the publication of statements on public fora to the transaction of goods and services, and the borderless nature of these electronic communications continue to occur between individuals in different jurisdictions, states, coasts, and countries, individuals *must* be able to structure and engage in their online conduct with some degree of predictability. The Due Process Clause of the 14th Amendment requires this assurance of predictability. Indeed, this Court stated, "[t]he Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). If, within the United States, the U.S. Circuit Courts continue to apply inconsistent methods of analysis to interpret minimum contacts and exercise specific personal jurisdiction, it will be difficult, if not impossible, for individuals and businesses to know whether their Internet activity will render them liable to suit in a foreign state.

This Court should grant review to resolve the conflict among the Circuit Courts and clarify the particular question of how to properly analyze specific personal jurisdiction for intentional torts that occur solely on the Internet where no other contact occurs between a defendant and the forum.

B. Statement of the Facts

Plaintiff Versity Corporation was an Illinois corporation, and Plaintiff John Tamburo is a resident of Illinois. Defendant Steven Dworkin resided in Canada;[1] Defendant Kristen Henry resides in Colorado; Defendant Roxy Hayes resides in Michigan; and Defendant Karen Mills resides in Ohio.

Plaintiff Versity Corporation created a commercial computer program, The Breeder's Standard .NET ("TBS.NET"), accessed through an Internet Web browser that provides paying customers with access to dog breeding and pedigree information stored in a database. Already suffering from significant debts, Versity Corporation, solely owned by Plaintiff John Tamburo, later transferred its assets, including TBS.NET, to Plaintiff John Tamburo d/b/a Man's Best Friend Software ("MBFS").

At all relevant times, the individual Defendants each operated hobby websites that provided limited access to similar dog pedigree databases that they created and maintained free of charge. The Defendants' websites used a popular open source software program called 'Alfirin'. The Plaintiffs reverse engineered this software and, by doing so, enabled themselves to "hack" the Defendants' websites and exploit a "back door" to gain access to the databases behind the respective websites. That access violated the websites' terms of use which forbid data harvesting or commercial use of the data. The Plaintiffs imported the data harvested into the commercial TBS.NET database without the Defendants' consent or permission.

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[1] Defendant Steven Dworkin is now deceased.

Defendants, after discovering the Plaintiffs took their information and had incorporated their work into the Plaintiffs' commercial product, individually voiced their displeasure in Internet discussion forums, on their own websites, and within emails to certain individuals. Some of the Defendants' comments informed readers that the Defendants offered the information at no charge; called for individuals to boycott the Plaintiffs' product; and/or, claimed that the Plaintiffs had stolen their work. The intensity of the statements differed among the individual Defendants.

All of the statements were made outside of Illinois. Indeed, the Defendants' posts to third-party websites constituted "public postings made from their respective locations outside of Illinois, permitting those with access to the sites to read the material." Pet. App. 54a.

The Plaintiffs alleged that they sustained "substantial economic harm" because of the postings. Pet. App. 67a-70a.

The Defendants' only physical contacts with Illinois arose through occasional participation in dog shows in

Illinois.[2] These contacts, though, did not in any way give rise to the claims in the Plaintiffs' Sixth Amended Complaint. Pet. App. 51a.

Applying the "sliding-scale" test from *Zippo*, the District Court below found that the Defendants' websites each established different levels of contact. At the height of its interactivity, Defendant Henry's website merely allowed individuals to enter and search for different pedigrees. Defendants Hayes and Mills had slightly more advanced websites. Defendant Hayes' website allowed users to submit voluntary donations to assist in Hayes' continued work. The website also provided preferential treatment to any individuals that make donations. Pet. App. 54a-56a. Defendant Mills' website linked to another site, owned by her, that solicited donations. However, the website from which the allegedly tortious activity stemmed did not solicit donations, but rather merely displayed information that she had collected. Pet. App. 56a. None of the websites in any way directly targeted citizens of Illinois, nor did they sell any products or services.

C. Procedural History

Plaintiff John Tamburo filed his original *pro se* complaint in 2004. The United States District Court for the Northern District of Illinois, Eastern Division later dismissed Plaintiff John Tamburo's Third

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[2] The Seventh Circuit notes that Defendants Henry, Mills, and Hayes have individually entered dogs in multiple shows taking place in Illinois and, "may individually have sold some of their dogs to customers in Illinois." Pet. App. 49a.

Amended Complaint holding that Versity Corporation was a principle party and, as a corporation required counsel to represent it, instructed him to find counsel should he seek to amend his complaint to add Versity Corporation. He did so.

On August 24, 2006, the Plaintiffs filed their Sixth Amended Complaint which contained twelve (12) counts including federal claims under the Sherman Antitrust Act and state tort claims such as defamation. On October 9, 2007, the District Court granted the Defendants' motion to dismiss the Sixth Amended Complaint and dismissed all counts based on lack of personal jurisdiction over each of the Defendants. Pet. App. 42a-65a.

On June 6, 2008, the Plaintiffs filed their Notice of Appeal and proceeded with an appeal to the Seventh Circuit. On April 30, 2010, the Seventh Circuit issued its opinion. The Seventh Circuit affirmed the District Court's ruling that Illinois lacked general jurisdiction over any of the Defendants. It dismissed all federal claims under the Sherman Antitrust Act for failure to state a claim and, consequently, affirmed the District Court's ruling that Illinois lacked specific jurisdiction over Defendant Wild Systems PTY, Ltd.

However, it also reversed the District Court in holding that there existed specific personal jurisdiction over Defendants Dworkin, Henry, Hayes, and Mills. In doing so, the Seventh Circuit resorted to an overly-broad interpretation of the *Calder* "effects" test instead of adopting and applying the already established, Internet-specific *Zippo* "sliding-scale" test. Pet. App. 1a-32a.

REASONS FOR GRANTING THE WRIT

1. This case brings to light a fundamental divide between the Circuit Courts in personal jurisdiction jurisprudence and, specifically, on the appropriate standard to be applied when determining whether a jurisdiction may exercise specific personal jurisdiction over a defendant whose alleged tortious activity occurred solely on the Internet. On one hand, the Seventh Circuit has recently, in the instant action, applied the *Calder* "effects" test articulated nearly thirty years ago in circumstances far removed from today's environment of instant electronic communications and the Internet. On the other hand, the Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, acknowledging the advancement and development of technology since *Calder* and the need for law to remain current, each accordingly adapted their jurisprudence by adopting the more appropriate *Zippo* "sliding-scale" test to preserve traditional notions of "fair play and substantial justice." *See Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Neogen Corp. v. Neo Gen Screenings, Inc.*, 282 F.3d 883 (6th Cir. 2002); *Lakin v. Prudential Securities*, 348 F.3d 704 (8th Cir. 2003); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999).

Unfortunately for the Defendants (who respectively reside in Canada, the Tenth Circuit, and two states within the Sixth Circuit), the instant matter arises from the Seventh Circuit's isolated and erroneous application of *Calder*. For, no relevant physical contacts existed between any of the Defendants and the State of Illinois; the Defendants did not send merchandise or tangible goods to Illinois; the alleged tortious conduct occurred solely on the Internet; and the individual Defendants' websites were public not commercial. Despite these facts, the Seventh Circuit rejected the Internet-focused *Zippo* "sliding-scale" test in favor of the *Calder* "effects" test.[3] Pet. App. 17a. As will be demonstrated below, the instant circumstances bear a closer resemblance to the facts in *Zippo* than those in *Calder*. As such, the *Zippo* standard remains the better suited standard for this and similar situations.

To date, this Court has never had the opportunity to determine the appropriate standard for determining whether specific personal jurisdiction exists over a defendant whose alleged intentional tortious conduct occurs solely on the Internet. Until this Court intervenes and decisively resolves the conflict and divide between the Circuits on this issue, the divide and the questions it presents will continue to have far-reaching negative consequences on the essential components of predictability and fair play in specific personal jurisdiction jurisprudence.

Indeed, the conflict between the Circuit Courts and the existing uncertainty could cause individuals in situations similar to that of the Defendants (who reacted with speech to wrongful conduct originally directed at them) to use the courts for purposes of communicating displeasure at the conduct of others rather than merely engage in speech and risk exposure to litigation in foreign jurisdictions where those about whom they complain reside or do business. Alternatively, in those situations where such individuals could not afford to initiate litigation or risk defending litigation in a foreign jurisdiction, the uncertainty arising from the split among the Circuit Courts could deter speech altogether. In fact, this could occur absent adoption of an Internet-specific test or a very narrow application of *Calder*.

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[3] While the Seventh Circuit never specifically adopted the *Zippo* test, it did look to the interactivity of a website in determining personal jurisdiction in a products liability case. *Jennings v. AC Hydraulics A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004).

For these reasons, this Court needs to articulate the appropriate standard to be used by all Circuit Courts, and thus applied to all individuals in the United States, in determining questions of specific personal jurisdiction where alleged tortious activity occurs solely on the Internet.

2. Assuming, *arguendo*, that the *Calder* "effects" test should be used to decide issues of specific personal jurisdiction in intentional tort cases where all contact and conduct occurs online, this case then presents the question of whether the "expressly aimed" requirement should be read broadly, requiring only conduct that is "targeted at a plaintiff whom the defendant knows to be a resident of the forum state,"[4]

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[4] *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000), *overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc) (overruling "that the 'brunt' of the harm need not be suffered in the forum state.").

or, "more narrowly, [requiring] that the forum state be the 'focal point of the tort.'"[5]

In the instant case, the Seventh Circuit concluded that "the individual defendants' use of their public websites to defame an Illinois-based businessman and exhort readers to boycott his products can . . . be conceptualized as an electronic 'entry' into Illinois for jurisdictional purposes." Pet. App. 22a. The resulting ruling, in which the Seventh Circuit found specific personal jurisdiction over the Defendants, directly conflicts with decisions of other Circuits and decisions of this Court. *See Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008); *Calder v. Jones*, 465 U.S. 783 (1984).

For this reason, if the *Calder* "effects" test is the appropriate standard, this Court must resolve how narrowly a court should apply the test to again ensure predictability, fair play and substantial justice in matters of specific personal jurisdiction.

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[5] Pet. App. 19a. (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071, 1074 (10th Cir. 2008)).

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS BY HOLDING COURTS SHOULD APPLY THE *CALDER* "EFFECTS" TEST INSTEAD OF THE *ZIPPO* "SLIDING-SCALE" TEST IN CASES WHERE ALL ALLEGEDLY TORTIOUS CONDUCT OCCURS ONLINE.

1. The Seventh Circuit Decision Below Directly Conflicts with the Fifth Circuit on the Question Presented and Clearly Creates a Circuit Divide.

Of the Circuit Court opinions that have addressed these issues, the facts underlying the Fifth Circuit's opinion in *Revell* most closely reflect the facts at issue below. Despite this factual similarity, the opinions from the Fifth Circuit in *Revell* and the Seventh Circuit below clearly conflict on the question of whether, in intentional tort cases where all relevant conduct occurs on the Internet, personal jurisdiction should be analyzed using *Zippo*'s "sliding-scale" test or *Calder*'s "effects" test.

The Seventh Circuit, in the opinion below, stated that it "hesitate[d] to fashion a special jurisdictional test for Internet-based cases." Pet. App. 17a. As a result, the Seventh Circuit adopted *Calder*'s "effects" test for all intentional tort cases, even in situations where the conduct occurs solely on the Internet. In doing so, the Seventh Circuit specifically endorsed the decision from the Western District of Wisconsin in *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004), which declined to adopt *Zippo* in intentional tort cases.

In *Hy Cite*, the district court declined to adopt the *Zippo* test for two reasons: (1) it did not believe a website's level of interactivity should be determinative for personal jurisdiction and (2) it failed to see the merit in a specialized test. *Hy Cite Corp.*, 297 F. Supp. 2d at 1160. With respect to the first reason, the court argued that examples may exist where a passive website could still support a finding of jurisdiction based on the intentional harm inflicted, and where an interactive site would not support jurisdiction because it never aimed any conduct at the forum state. *Id.* However, the court in *Hy Cite* misinterpreted the scope of the analysis in *Zippo* as being limited solely to examining the interactivity of websites. Indeed, neither the court in *Zippo* nor the courts adopting *Zippo* have espoused such a limited examination.

In *Zippo*, after the court determined the website in question to be interactive, the court still considered "whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania." *Zippo Manufacturing Co.*, 952 F. Supp. at 1125-26. As such, the application of the *Zippo* "sliding-scale" test is not a determinative factor, but rather a starting point in Internet-based jurisdictional analysis that provides a "likelihood that personal jurisdiction can be constitutionally exercised." *Id.* at 1124.

The *Hy Cite* court based its second reason for rejecting the *Zippo* test on its interpretation of this Court's typical rejection of "mechanical" tests for personal jurisdiction and traditional preference for creating a flexible standard. *Hy Cite*, 297 F. Supp. 2d at 1160 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)). However, the *Zippo* "sliding-scale" test, although serving as a specialized test for Internet-based jurisdictional analysis, fulfills this Court's preference for a flexible standard in determining personal jurisdiction.[6] Indeed, the "sliding-scale" test is not outcome determinative, but allows courts flexibility in determining jurisdiction. Further, it enables the court to apply the standards of "fair play and substantial justice" that have always guided this analysis. *International Shoe Co.*, 326 U.S. at 316 (citing *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

The Fifth Circuit demonstrated the flexible nature of the *Zippo* "sliding-scale" test, and disproved the *Hy Cite* court's criticism of *Zippo* as outcome determinative in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002). In *Revell*, a claim for defamation arose from a Harvard professor's article that was posted to a public "bulletin board" on a website maintained by Columbia University. *Id.* at 469. The article accused a Texas citizen of playing a substantial role in the cover-up of a terrorist plot. *Id.* The subject of the article attempted to bring both the author and Columbia

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[6] This Court has consistently sought flexibility in determining personal jurisdiction. In *Hanson v. Denckla*, the Court recognized the need for federal courts to be sensitive and responsive to changes in technology when analyzing personal jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). The Court in *Hanson* noted that jurisdiction would have to expand as communication and technology made physical contacts less necessary. It also carefully noted, however, that this would not spell the demise of personal jurisdiction limitations. *Id.* at 251. While decided well before the pervasiveness of the Internet, *Hanson* laid down a foundation for technological developments still to come.

University's trustees, located in New York, into a Texas court. *Id.*

Like the case at hand, the plaintiff argued that the court should apply the *Calder* "effects" test instead of the *Zippo* "sliding-scale" test to determine personal jurisdiction. *Revell*, 317 F.3d at 471-72. The Fifth Circuit, however, found this argument unpersuasive. It stated that "this circuit has drawn upon the approach of *Zippo* . . . in determining whether the operation of an Internet site can support the minimum contacts necessary for the exercise of personal jurisdiction." *Id.* at 470. The court reasoned that "[d]efamation has its unique features, but shares relevant characteristics with various business torts. Nor is the *Zippo* scale, as has been suggested, in tension with the 'effects' test of *Calder v. Jones* for intentional torts." *Id.* The court found the website to be partially interactive because the users could participate in open forums. *See id.* at 472. Users could post information, receive information from others, and receive information from the hosts of the site. *Id.* at 472. Declaring that the website is interactive is not the final step, however. After finding the website interactive, the court in *Revell* proceeded to "evaluate the extent of this interactivity . . . with respect to *Calder*." *Id.*

Like *Revell*, the case at hand confronts issues of personal jurisdiction for claims of intentional torts occurring solely on the Internet. However, the Defendants' websites are more passive than the website in *Revell* in that there is no direct user input. At the most interactive, one of the Defendants' websites allowed visitors to submit voluntary donations to assist in that defendant's continuing voluntary efforts. Application of the *Zippo* test to this case would be consistent with the Fifth Circuit's analysis in *Revell* and, as demonstrated below, establish uniformity among the Circuit Courts.

2. *The Majority of Circuits Have Either Indicated Agreement with the Fifth Circuit in Applying* Zippo *or Applied* Zippo *Pending Supreme Court Clarification.*

Several additional Circuit Courts have also addressed the issue of personal jurisdiction with respect to claims resulting from conduct occurring entirely on the Internet. Each of these Circuits are addressed briefly below.

The Third Circuit adopted *Zippo* and continues to apply the same standard. In 2003, the Third Circuit stated that "[t]he opinion in *Zippo* . . . has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet website." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003). *Toys "R" Us* involved claims of trademark infringement and "cybersquatting" between Toys "R" Us, a New Jersey company, and Step Two, a Spanish company. *Id.* at 448. In its analysis, the court noted importantly that, in addition to operating a *Zippo*-interactive website, there must be more evidence that a defendant has "purposefully availed" itself of the laws of the forum state. *Id.* at 454-55.

When faced with the issue of personal jurisdiction based solely on Internet contacts, the Fourth Circuit stated that until the United States Supreme Court rearticulates a rule "in light of advances in technology," it would "adopt . . . the model developed in

Zippo." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002). In determining "whether a Georgia-based Internet Service Provider ("ISP") subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet in violation of a Maryland corporation's copyrights," *id.* at 709, the court concluded that, even though electronic signals from the ISP's facility were received in Maryland, the activity was *Zippo*-passive and did not subject the corporation to jurisdiction. *Id.* at 714.

The Sixth Circuit examined this same issue in *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883 (6th Cir. 2002). The website at issue in *Neogen* advertised the company's services; provided contact information; provided customers with passwords as part of a contract that enabled the use of the company's products from foreign locations; and advertised that it would perform its services "on any parent in any state." *Id.* at 890-91. Applying the *Zippo* test, the court determined that this website fell in the middle range of interactivity and did not suffice on its own to maintain personal jurisdiction over the defendant in Michigan. *Id.* Like the Fifth Circuit, the Sixth Circuit determined that "[a] defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with the residents of the state." *Id.* at 890 (citing *Zippo Manufacturing Co.,* 952 F. Supp. at 1124). To that end, the Sixth Circuit found that "[s]everal aspects of the website, however, support a finding of purposeful availment." *Id.* The court concluded that the defendant was subject to personal jurisdiction.

Additionally, the Eighth Circuit has indicated its approval of *Zippo*. *Lakin v. Prudential Securities*, 348 F.3d 704, 711 (8th Cir. 2003). In the context of determining general personal jurisdiction, the Eighth Circuit stated, "we agree with our sister circuits that the *Zippo* model is an appropriate approach in cases of specific jurisdiction." *Id.* at 711.

In discussing the determination of personal jurisdiction based upon websites, the Ninth Circuit noted that "the common thread, well stated by the court in *Zippo*, is that 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (citing *Zippo Manufacturing Co.,* 952 F. Supp. at 1124). In *Cybersell*, the Floridian defendant's website did nothing more than display information about their services and use the name at issue, Cybersell, at the top of the page. *Cybersell, Inc.*, 130 F.2d at 415. Like the Defendants in the case at hand, the defendants in *Cybersell* did nothing to encourage people in the forum state of Arizona to view the site, nor did they conduct any business transactions within the forum state. *Id.* at 419. As a result, the court held the defendant's contacts with Arizona through the website to be insufficient to warrant being haled into court in Arizona. *Id.* at 419-20.

The Tenth Circuit applied the *Zippo* "sliding-scale" test in *Soma Medical International v. Standard Chartered Bank* to determine whether a bank's website, which did nothing more than display information about their services to those who were interested, created sufficient contacts with Utah.

Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292, 1299 (10th Cir. 1999). The court concluded its *Zippo* analysis by finding that, in the context of general personal jurisdiction, "[t]he website appears to be a 'passive website that does little more than make information available to those who are interested.'" *Id*. at 1297 (citing *Zippo Manufacturing Co.*, 952 F. Supp. at 1124).

In sum, nearly all U.S. Circuit Courts have either expressly adopted or indicated approval for the *Zippo* test in some form for determining whether specific personal jurisdiction exists over a defendant based on conduct occurring solely on the Internet. Despite this, the Seventh Circuit – being in this instance the court below – has rejected this near unanimity in favor of maintaining the application of the *Calder* "effects" test to such questions of personal jurisdiction. As such, the Seventh Circuit has highlighted (if not created) a significant split among the Circuits that must be resolved by this Court. Indeed, in its opinion below, the Seventh Circuit nearly calls for this Court to do so.[7]

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[7] The court acknowledged that other circuits, namely the Fourth, Fifth, and Ninth, had successfully applied the *Zippo* test to Internet-based tortious acts, though it was hesitant to do so. *Tamburo*, 601 F.3d at 703. In choosing to apply the *Calder* test to an Internet-based tortious act, the court acknowledged both the difficulty of such an application of the *Calder* "effects" test and the lack of Supreme Court guidance on the matter: "Extracting these requirements from *Calder* is reasonably straightforward; applying them in specific cases--especially cases like this one alleging tortious acts committed over the Internet--is more challenging." *Id.* at 703. "The Supreme Court has not elaborated on this requirement, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984) (full citation added), and the

3. *This Court Must Articulate the Appropriate Test and the Application of Such Test for Determining Specific Personal Jurisdiction on the Internet*

On very similar factual circumstances, there clearly exists a conflict and split between the Fifth and Seventh Circuit on whether to apply the *Zippo* test (Fifth Circuit) or the *Calder* "effects" test (Seventh Circuit) to determine whether personal jurisdictions exists for conduct occurring solely on the Internet. A clear majority of the Circuit Courts endorse *Zippo* and, in many circumstances, expressly reject the "effects" test. Yet, a conflict remains which needs resolution by clear identification of the appropriate test to be applied in such circumstances.

Moreover, should this Court endorse the *Zippo* test, it also needs to clearly articulate the appropriate application of the *Zippo* test given its varied application among the federal courts. For, the significant uncertainty of the appropriate standard in this context makes it nearly impossible for an individual or business to create or utilize a website with any confidence as to where such conduct might cause he/she/it to be haled into court as a defendant against any potential claims arising therefrom.

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occasional difficulty in applying it has led to conflict among the circuits." *Id.* at 708.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "EXPRESSLY AIMED" PRONG OF THE *CALDER* "EFFECTS" TEST CONFLICTS WITH SUPREME COURT PRECEDENCE AND OPINIONS FROM OTHER CIRCUIT COURTS

1. *This Court, Through Its Decision in* Calder, *Requires More than an Injury to the Plaintiff in the Forum State to Establish Minimum Contacts Between the Defendant and the Forum State.*

This Court held that personal jurisdiction is proper when a defendant has enough contacts with a forum state that they can, "reasonably anticipate [being] haled into court there." *World-Wide Volkwagen Corp.*, 444 U.S. at 297. In *Calder*, the Court considered what contacts would be sufficient to require an out-of-state defendant to be haled in to court in a state they never physically contacted. *Calder*, 465 U.S. at 788-90. In order to meet the requirements of the Due Process Clause and not offend "traditional notions of fair play and substantial justice," the Court developed a test to evaluate an out-of-state defendant's "effects" on the forum state. *Id.* at 789. The "effects" test requires (1) intentional conduct, (2) expressly aimed at the forum state, (3) when the defendant knows that the harm would be felt in the forum state. *See Dudnikov*, 514 F.3d at 1072 (finding the three prong test by "[d]istilling *Calder* to its essence"). The "expressly aimed" requirement is at issue here.

In the decision below, the Seventh Circuit has essentially interpreted the "expressly aimed" prong to require only that a defendant knows where a plaintiff lives and that an injury occurs in the forum state for that defendant to be brought in to court within the forum state. Pet. App. 19a-23a.

Such a construction runs afoul of "traditional notions of fair play and substantial justice." In *Calder*, this Court determined that California, the forum state, was "the focal point of both the story and of the harm suffered." *Calder,* 465 U.S. at 789. However, the Court focused on more than the location of injury in its analysis. Specifically, the Court mentioned that the defendant's publication did more business in California than anywhere else; the defamatory article used California sources; and, the plaintiff's career (as a famous actress performing in California) and livelihood were especially impacted by the article's reception in California. *Id.* at 788-90. As such, *Calder* requires more than merely that an injury occurs in the forum state.[8] *Id.*

2. *The Seventh Circuit's Application of the* Calder *"Effects" Test Conflicts Significantly with the Majority of the Other Circuit Courts and Creates a Circuit Divide that this Court Must Resolve*

Since this Court's decision in *Calder,* the Circuit Courts have attempted to analyze and apply the *Calder* "effects" test with mixed results. The primary source of uncertainty and variance among the Circuit Courts surrounds the "expressly aimed" prong of the "effects" test. Through their analysis and application of the "effects" test and the "expressly aimed" prong in particular, the Circuit Courts have reached different results as to what does and does not satisfy personal jurisdiction. The courts themselves have recognized this lack of uniformity. *See Dudinkov*, 514 F.3d at 1071.

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[8] Here, none of the factors noted in *Calder* are present beyond the alleged conduct injuring an Illinois resident within the forum state. As such, the facts giving rise to personal jurisdiction in *Calder* do not exist here.

The Third Circuit analyzed the *Calder* "effects" test in *Imo Industries, Inc. v. Kiekert AG*. *Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998), a non-internet case. In *Imo,* the plaintiff, a corporation with its principle place of business in New Jersey, alleged that the defendant, a German corporation, tortiously interfered with the sale of its business by means of letters sent to the investment firm representing Imo in the sale. This conduct resulted in the cancellation of negotiations for the sale and a considerable loss to Imo. *Id.* at 257-58.

In its application of *Calder* in *Imo*, the Third Circuit focused on the "expressly aimed" prong stating that "the forum was the focal point of the tortious activity in the sense that the tort was 'expressly aimed' at the forum." *Id.* at 261. The court noted that an essential element of the "expressly aimed" prong was the defendant's knowledge that the "brunt" of the injury felt by the plaintiffs would occur in the forum in question. *Id.* at 266. Citing decisions by some of its sister circuits in *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997) (holding personal jurisdiction failed because the defendant had knowledge that missapropriating the plaintiff's trades secret would injure the plaintiff), *Southmark Corp. v.*

Life Investors Inc., 851 F.2d 763 (5th Cir. 1988) (stating personal jurisdiction was lacking because there was no evidence to show the defendant knew where the plaintiff's injury would be felt), and *Far West Capital, Inc. v. Towne,* 46 F.3d 1071 (10th Cir. 1995)(articulating that phone calls and sending letters are "not sufficient in themselves to establish minimum contacts."), the court reasoned that the mere fact a plaintiff feels the effect of the tortious conduct within the forum in question is simply not enough to satisfy the *Calder* test. *Id.* at 263. Rather, a plaintiff must prove that the defendant "expressly aimed" its conduct towards the forum and intended for the forum to be the focal point of the tortious conduct. *Id.* In short, the Third Circuit held that it is the defendant's *knowledge* of where the "brunt" of the injury occurs that subjects him to the personal jurisiction of that forum state. This counters the Seventh Circuit's broad view that personal jurisdiction is appropriate in the forum where the plaintiff's injuries are felt.

The Third Circuit in *Imo*, explicitly criticized the Seventh Circuit's view on personal jurisdiction, and rejected the Seventh Circuit's analysis in *Janmark, Inc. v. Reidy,* 132 F.3d 1200, 1202 (7th Cir. 1997) (holding jurisdiction proper in the forum state where the plaintiff felt the injury of the alleged tort). *Imo Industries, Inc.*, 155 F.3d at 263 (citing *Janmark,* 132 F.3d at 1202). It concluded that the Seventh Circuit's application of the *Calder* test was too broad and failed to take into account the defendant's "express aiming" or intention of the forum state to be the focal point of its tortious conduct. *Id.* at 263-64. The court criticized the *Janmark* decision for failing to "pay necessary attention to the defendant's knowledge and intent in committing the tortious activity." *Id.* at 264.

The Fourth Circuit, like the Third Circuit, has opposed the Seventh Circuit's broad views on personal jurisdiction, in *ESAB Group Inc. v. Centriut, Inc. ESAB Group Inc.*, 126 F.3d 617, a non-internet case. In *ESAB*, the plaintiff, a company located in South Carolina, accused another company and various individuals of conspiring to appropriate trade secrets and customer lists from it. *Id.* at 621. The court considered specific personal jurisdiction and applied the *Calder* "effects" test. It determined that the activities of the defendants in appropriating the trade secrets were focused on customers located throughout the United States *and not, as the plaintiff argued, on South Carolina alone. Id.* at 625-26. With respect to the plaintiff's unfocused appeal to *Indianapolis Colts*, the Fourth Circuit clearly stated that jurisdiction cannot be based solely on the forum in which an injury occurs and that a defendant must also "enter" the state in some fashion. *Id.* at 625 (citing *Indianapolis Colts, Inc.*, 34 F.3d at 412). *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd. Partnership*, 34 F.3d 410 (7th Cir. 1994). The court explained that to allow jurisdiction based only on the forum in which the injury occurred would make jurisdiction always appropriate in the plaintiff's home state and that, "although the place (of injury) is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld." *ESAB Group, Inc.* at 626.

The Fourth Circuit's reasoning in *ESAB Group Inc.* directly conflicts with the Seventh Circuit decision below. Indeed, based on the opinion below, the Seventh Circuit will find jurisdiction proper in a forum whenever an injury occurs within the forum regardless of whether the defendant's conduct has been directed throughout the United States – as the case in *ESAB Group Inc.* and the instant case. This represents a significant distinction between the interpretations of *Calder* that needs to be resolved by this Court.

The Ninth Circuit continued the development of the Fourth Circuit's viewpoint on personal jurisdiction by requiring "something more" in addition to the plaintiff's place of injury. *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d at 1087 (9th Cir. 2000) *overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc). In *Bancroft*, the plaintiff, a small California business, sought a declaratory judgment against Augusta National Inc. ("ANI") with respect to Bancroft's ownership of the domain name "masters.com." *Id.* at 1084-85. The district court granted ANI's motion to dismiss for lack of personal jurisdiction, but the Ninth Circuit reversed and remanded upon application of the *Calder* "effects" test. *Id.* at 1087, 1089.

In applying *Calder*, the Ninth Circuit recognized the "struggle" that other courts had faced when applying the "effects" test to personal jurisdiction. *Id.* at 1087. In a decision similar to the Third Circuit's finding in *Imo,* the court reasoned that there must be "something more" than just an injury within the forum state in order to satisfy personal jurisdiction. *Id.* The court determined that the "something more" was the "expressly aimed" concept developed in *Calder* and that "expressly aimed" is satisfied when a defendant knowingly targets the plaintiff in the forum state and directs its tortious activities into that state. *Id.* In applying the "expressly aimed" concept to *Bancroft*, the

Ninth Circuit found the test met when the letters sent by ANI were expressly aimed at Bancroft, targeted them individually as a business in California, and ANI knew that the effect of their letters would be felt in California. *Id.* at 1088.

The Ninth Circuit further distanced itself from the Seventh Circuit's interpretation of *Calder* in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), a non-internet case. In *Schwarzenegger*, an Ohio car dealership used photos of Arnold Schwarzenegger as the Terminator in its advertisements. *Id.* at 799. The court held that, although the advertisements eventually caused Schwarzenegger harm in California and the defendant knew Schwarzenegger lived in California, this did not suffice to allow jurisdiction over the defendant in California. *Id.* 806-07. The court summarized its previous decisions in similar cases and noted that where jurisdiction had been found there existed "something more" in each case. *Id.* at 807. This "something more" is lacking in the Seventh Circuit's previous opinions and the opinion below, resulting in a circuit split that necessitates the Supreme Court's guidance.

The Tenth Circuit developed yet another interpretation of the *Calder* "effects" test. In its interpretation of *Calder*, the Tenth Circuit took a somewhat different approach and utilized a "bank shot" analogy to explain its holding. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008). In *Dudnikov*, the plaintiffs were a husband and wife team living in Colorado who frequently sold fabric on the online auction site eBay located in California. *Id.* at 1068. The defendant, a Delaware corporation with its principal place of business in Connecticut, represented an artist who believed the plaintiffs were infringing his rights by using portions of his images on the fabrics they were selling. *Id.* Operating under this belief, the defendant contacted eBay and had it suspend the auction by submitting a notice of claimed infringement pursuant to the rules of eBay's "Verified Rights Owner" program. *Id.* Upon receiving the notice, eBay suspended the auction and notified the defendant that the suspension would be lifted after 10 days if legal proceedings were not initiated by the parties. *Id.* at 1068-69. The plaintiffs, upon receiving notice of the infringement, decided to take action and filed for a declaratory judgment clarifying that they were not infringing on the defendant's copyrights. *Id.* at 1069.

Even though the conduct in question, the notice of infringement sent to eBay in California, did not target the plaintiffs in Colorado specifically, the Tenth Circuit utilized the basketball "bank shot" analogy and reasoned that the defendant had utilized eBay in California with "the ultimate purpose of cancelling plaintiffs' auction in Colorado." *Id.* at 1075. The Tenth Circuit purported its analysis of personal jurisdiction in *Dudnikov* to be in line with the Supreme Court's landmark holding in *Burger King*. *Id.* at 1075. As a result, the court could now find personal jurisdiction over an individual who established contacts in one state, with the express aim of using those contacts to affect the plaintiff in the forum state. *See id.* at 1074-77. At a minimum the Third, Fourth, Ninth and Tenth Circuits require analysis of the defendant's knowledge or actions in determining personal jurisdiction. This counters the Seventh

Circuit's analysis that focuses solely on the plaintiff's injury and disregards the defendant from its analysis.

The Seventh Circuit and the Third Circuit have reached holdings that directly conflict with one another on whether alleged harm occurring within a forum state is sufficient to satisfy the "expressly aimed" prong of the *Calder* "effects" test. Appellate decisions on the issue display a wide range of possibilities, from requiring "something more" to allowing jurisdiction based on actions similar to a "bank shot" in basketball. *Compare Bancroft & Master, Inc.*, 223 F.3d at 1087 ("We now conclude that 'something more' is what the Supreme Court described as 'express aiming' at the forum state") *with Dudnikov*, 514 F.3d at 1075 (stating defendant's "express aim" reached Colorado, via California, like a bank shot in basketball). Similar to the *Zippo* discussion above, the discrepancies between the Circuit Courts here do not allow for any predictability for individuals conducting themselves on the Internet. Further, the circuit courts could benefit from the discretion and guidance this Court can provide.

3. *This Court Must Articulate the Appropriate Interpretation of the "Expressly Aimed" Prong Within the Calder "Effects" Test*

There exists a very clear split between the Circuit Courts as to whether an alleged injury occurring in the forum state sufficiently satisfied the "expressly aimed" requirement of *Calder* or if "something more" is required. Apart from the clear division between the majority of Circuit Courts that require "something more" and the Seventh Circuit that does not, there also exist differences among the Circuit Courts as to what constitutes the "something more" they require. Consequently, this Court must resolve the differences among the Circuit Courts by deciding affirmatively whether "something more" is required, as the majority of the Circuit Courts have concluded, and delineate what constitutes "something more." The current lack of clarity between the Circuit Courts makes it nearly impossible for a person to know what actions may result in being haled into court in a given forum. This uncertainty violates the guiding principles of predictability and substantial justice required by this Court and the United States Constitution. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297; *International Shoe Co.*, 326 U.S. at 316 (1945).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2406

[Filed April 8, 2010]

JOHN F. TAMBURO doing business as)
MAN'S BEST FRIEND SOFTWARE)
and VERSITY CORPORATION,)
)
Plaintiffs-Appellants,)
)
v.)
)
STEVEN DWORKIN, KRISTEN HENRY,)
ROXANNE HAYES, KAREN MILLS,)
and WILD SYSTEMS PTY LTD.,)
)
Defendants-Appellees.)
)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 3317—**Joan B. Gottschall**, *Judge*.

ARGUED FEBRUARY 26, 2009—
DECIDED APRIL 8, 2010

Before BAUER, KANNE, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* John Tamburo, an Illinois resident who operates a dog-breeding software business in Illinois, filed suit in the Northern District of Illinois alleging federal and state antitrust violations and several intentional tort claims under Illinois law. His claims arise out of a dispute over the contents of a dog-pedigree software program he developed by lifting data from the defendants' websites. He alleges the defendants used the Internet to retaliate against him for copying their online data, which he contends was in the public domain. The defendants are a Canadian proprietor of a dog-pedigree website who has never visited or transacted business in Illinois; three Americans who likewise maintain dog-pedigree websites and are residents of Colorado, Michigan, and Ohio with only sporadic contacts with Illinois; and an Australian software company with insignificant sales in Illinois. This appeal requires us to apply long-established rules for asserting personal jurisdiction over foreign defendants to the relatively new setting of torts committed over the Internet.

Tamburo alleges that the individual Canadian and American defendants engaged in a concerted campaign of blast emails and postings on their websites accusing him of stealing their data and urging dog enthusiasts to boycott his products. He also claims they sent some of these messages to the owner of the Australian company, who reposted them to a private dog-breeder listserve. These emails and Internet postings, Tamburo claims, violate federal and state antitrust laws, were defamatory and tortiously interfered with his software business, and constituted a civil conspiracy to boot. The defendants moved to dismiss for lack of personal jurisdiction and alternatively for failure to state a claim. The district court dismissed the case against all defendants for lack of personal jurisdiction.

We affirm in part and reverse in part. First, Tamburo's federal and state antitrust allegations are woefully inadequate under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); we affirm the dismissal of those claims on the alternative basis that they fail to state a claim. Without a viable federal claim, personal jurisdiction is determined under Illinois' long-arm statute, which authorizes jurisdiction to the full extent permitted by the United States Constitution. 735 ILL.COMP.STAT.5/2-209(c). General personal jurisdiction is lacking here; none of the defendants has continuous and systematic contacts with Illinois.

Applying *Calder v. Jones*, 465 U.S. 783 (1984), we conclude that specific personal jurisdiction lies in Illinois over the individual Canadian and American defendants on Tamburo's intentional tort claims. These defendants are alleged to have used their websites—or in the case of the Canadian defendant, blast emails to the online dog-pedigree community—to defame and tortiously generate a consumer boycott against Tamburo, knowing that he lived and operated his software business in Illinois and would be injured there. Indeed, some of the messages specifically listed Tamburo's Illinois address and urged readers to harass him. This is enough for a prima facie case of personal jurisdiction under *Calder*'s "express aiming" test for personal jurisdiction in intentional-tort cases. The case for personal jurisdiction over the Australian company is much weaker. Tamburo alleged only that the owner of the company received messages from the other defendants and reposted them on a private listserve. There is no allegation that he disseminated the messages more broadly or that he knew that Tamburo operated his business in Illinois. Accordingly, Tamburo's allegations are insufficient to establish a prima facie case for specific personal jurisdiction over the Australian company.

I. Background[1]

John Tamburo, doing business as Man's Best Friend Software, lives and operates his business in Illinois. He designs software for use by dog breeders and noncommercial dog enthusiasts.[2] One of his products, an online database called The Breeder's Standard, provides customers with access to dog-pedigree information. To create the database, Tamburo developed an automated computer program that scanned the Internet for information about dog pedigrees. He then incorporated the data he retrieved into The Breeder's Standard.

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[1] Because this case comes to us from a jurisdictional dismissal on the pleadings, we take the factual background from the Sixth Amended Complaint, and where not contradictory, from affidavits submitted by the parties in connection with their motion to dismiss.

[2] Tamburo was also the president and sole shareholder of Versity Corporation, the other plaintiff in this suit. Versity dissolved in May 2004 just before this lawsuit was filed and appears as a plaintiff by virtue of 805 ILL. COMP. STAT. 5/12.80, the Illinois statute authorizing postdissolution survival of actions.

Defendants Kristen Henry, Roxanne Hayes, Karen Mills, and Steven Dworkin are proprietors of public websites that provide free access to dog-pedigree information. Henry, a Colorado citizen and resident, also breeds and shows dogs. Hayes, a Michigan citizen and resident, raises, shows, and "places" dogs but does not commercially breed them. Mills, a citizen and resident of Ohio, raises and shows dogs. Dworkin, a Canadian citizen who resides in Ottowa, also raises and shows dogs.[3]

Tamburo pulled much of the information included in The Breeder's Standard from the websites operated by Henry, Hayes, Mills, and Dworkin. In retaliation Henry, Hayes, and Mills posted statements on their websites accusing Tamburo of "theft," "hacking," and "selling stolen goods," and calling on readers to boycott his products. They also posted Tamburo's Illinois address on their websites and urged readers to contact him to harass him and otherwise complain. Dworkin retaliated in a different way. First, he emailed Tamburo and demanded that he remove the "blatent [sic] theft of data" from The Breeder's Standard "within 5 days." If Tamburo failed to do so, Dworkin threatened to "publish to each and every dog[-]based list the sleazy methods" of Tamburo's operation. When Tamburo did not comply, Dworkin emailed "all persons who had a free online database of dog pedigrees on the Internet" saying that Tamburo's product contained pedigree data that was "stolen," "mined," and "harvested" for improper "commercial use," and suggested that all proprietors of online dog-pedigree databases "band together to stop this theft" of their data.

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[3] Dworkin died during the pendency of this appeal; defendants' counsel represents his estate.

The fifth defendant is Wild Systems Pty Ltd., an Australian software company that offers a pedigree software program called Breedmate. Wild Systems also runs a private online Yahoo! email listserve for customers who have purchased the Breedmate software. Ronald DeJong, the owner and president of Wild Systems, manages this email list and must approve any message sent to it. The individual defendants sent DeJong messages for posting on the Breedmate listserve; these messages, like the others, protested that Tamburo had stolen their data. DeJong in turn transmitted these messages to the Breedmate listserve. Later, DeJong and the individual defendants organized a closed Internet chat group—called the "APDUG Group"[4]—for users of Alfirin software, a product used to manage dog-pedigree databases. In messages posted to the APDUG Group, the individual defendants again accused Tamburo of "theft," "selling stolen goods," and "hacking."

Tamburo sued the five defendants in the Northern District of Illinois, seeking a declaratory judgment that he did not violate any federal law by incorporating the defendants' databases into his software. He also sought damages for federal and state antitrust violations and asserted claims for defamation, tortious interference with existing contracts and prospective economic advantage, trade libel, and civil conspiracy under Illinois law.[5]

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[4] "APDUG" stands for Alfirin Pedigree Database Users Group.

The defendants moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim. *See* FED. R. CIV. P. 12(b)(2), 12(b)(6). The district court concluded that personal jurisdiction was lacking as to all defendants and dismissed the case without considering the alternative failure-to-state-a-claim arguments. Tamburo moved for reconsideration, asking the court to transfer the case to the Western District of Michigan. This motion was denied and Tamburo appealed.

II. Discussion

A. Antitrust Claims

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the pleading requirements for antitrust claims: "[A] formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555-56 (citations and all caps omitted). "Because § 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy, . . . [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express . . . ." *Id.* at 553 (internal quotation marks and citations omitted) (alterations in original). Accordingly, a complaint alleging an antitrust claim must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. In addition, depending on the nature of the claim, the complaint must plausibly plead the existence of an antitrust injury; this requires factual allegations suggesting that the "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 716 (7th Cir. 2006) (internal quotation marks omitted).

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[5] Tamburo estimates he lost over $525,000 in sales as a result of the defendants' conduct.

Tamburo's antitrust claims are pleaded in a wholly conclusory fashion; as such, it is hard to tell what kind of antitrust violation he is trying to assert. The complaint contains no factual allegations suggesting the existence of an antitrust conspiracy or an antitrust injury. The federal claim alleges only that the defendants possessed "monopoly power in the relevant market of dog breeding data," which they acquired "by means of anticompetitive and/or predatory conduct," and that this "violated provisions of Federal Antitrust statutes including 15 U.S.C. [§§] 1, *et seq*." This appears to sweep in the entire gamut of federal antitrust violations, but there are no allegations whatsoever regarding an antitrust injury. The complaint alleges only that Tamburo "has been damaged" as a result of "the wrongful acts of Defendants." This manner of pleading a federal antitrust claim is plainly improper under *Twombly*.

Tamburo's attempt to plead a state-law antitrust violation fares no better. The complaint asserts a claim under the Illinois Antitrust Act, 740 ILL. COMP. STAT.

10/1 *et seq.*, which parallels the federal Sherman and Clayton Acts. But this section of the complaint simply repeats the inadequate allegations contained in the federal antitrust claim. Because federal pleading standards apply when we sit in diversity, *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 670 (7th Cir. 2008), Tamburo's state antitrust claim, like his federal one, fails to state a claim upon which relief can be granted. Accordingly, both claims were properly dismissed, though on Rule 12(b)(6) grounds rather than Rule 12(b)(2) grounds.

B. Personal Jurisdiction

We review a dismissal for lack of personal jurisdiction de novo. *GCIU-Employer Ret. Fund v. Goldfarb Corp.*, 565 F.3d 1018, 1023 (7th Cir. 2009). The plaintiff has the burden of establishing personal jurisdiction, and where, as here, the issue is raised by a motion to dismiss and decided on the basis of written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts. *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). At this stage, therefore, we take as true all well-pleaded facts alleged in the complaint and resolve any factual disputes in the affidavits in favor of the plaintiff. *Id.* ("In evaluating whether the prima facie standard has been satisfied, the plaintiff is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record." (internal quotation marks omitted)).

Where no federal statute authorizes nationwide service of process,[6] personal jurisdiction is governed by the law of the forum state. FED. R. CIV. P. 4(k)(1)(A); *see also Citadel Group Ltd. v. Wash. Reg'l Med. Ctr.*, 536 F.3d 757, 760 (7th Cir. 2008). A court's exercise of personal jurisdiction may be limited by the applicable state statute or the federal Constitution; the Illinois long-arm statute permits the exercise of jurisdiction to the full extent permitted by the Fourteenth Amendment's Due Process Clause, 735 ILL. COMP. STAT. 5/2-209(c), so here the state statutory and federal constitutional inquiries merge. *See Citadel Group Ltd.*, 536 F.3d at 761. The key question is therefore whether the defendants have sufficient "minimum contacts" with Illinois such that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*

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[6] Tamburo argues that nationwide service of process was authorized pursuant to Rule 4(k)(1)(c) of the Federal Rules of Civil Procedure, together with § 22 of the Clayton Act, 15 U.S.C. § 22, or alternatively, under Rule 4(k)(2). Both jurisdictional bases, however, require a claim arising under federal law. Because Tamburo failed to adequately plead a federal antitrust claim, these jurisdictional options drop out of the case. We note for completeness that the circuits are divided over the proper interpretation of the venue and service of process language in § 22 of the Clayton Act. *See In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 293-97 (3d Cir. 2004) (describing the circuit split). This circuit has not yet addressed the matter, and because we are affirming the dismissal of the federal antitrust claim for failure to state a claim, we need not do so here. Moreover, as Tamburo's counsel properly conceded at oral argument, the presence of a claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, does not supply a basis for acquiring personal jurisdiction over the defendants under Rule 4(k)(1)(C) or Rule 4(k)(2). *See Commercial Nat'l Bank of Chi. v. Demos*, 18 F.3d 485, 490 (7th Cir. 1994).

Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

Stated differently, each defendant must have purposely established minimum contacts with the forum state such that he or she "should reasonably anticipate being haled into court" there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quotation marks omitted). But jurisdiction cannot be avoided "merely because the defendant did not *physically* enter the forum State." *Id.* at 476. The Supreme Court has observed that "a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Id.* Still, we have said that "[p]otential defendants should have some control over—and certainly should not be surprised by—the jurisdictional consequences of their actions." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997). The Due Process Clause "gives some minimum assurance as to where that conduct will and will not render them liable to suit." *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

1. General Personal Jurisdiction

The nature of the defendant's contacts with the forum state determines the propriety of personal jurisdiction and also its scope—that is, whether jurisdiction is proper at all, and if so, whether it is general or specific to the claims made in the case. A defendant with "continuous and systematic" contacts with a state is subject to general jurisdiction there in any action, even if the action is unrelated to those contacts. *Helicopteros Nacionales de Colombia, S.A. v.*

Hall, 466 U.S. 408, 416 (1984). The threshold for general jurisdiction is high; the contacts must be sufficiently extensive and pervasive to approximate physical presence. *Purdue Research Found.*, 338 F.3d at 787 & n.16. As such, isolated or sporadic contacts—such as occasional visits to the forum state—are insufficient for general jurisdiction. *Burger King*, 471 U.S. at 475. Nor is the maintenance of a public Internet website sufficient, without more, to establish general jurisdiction. *See Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002).

Illinois cannot exercise general personal jurisdiction over any of the defendants in this case. Henry has been to Illinois only twice in ten years. Hayes has been to Illinois approximately 5 times and has placed 13 dogs with families in Illinois but did not receive any profits from these placements. She sold three copies of her book to individuals in Illinois through her website. Mills grew up in Illinois but moved away in 1979 and has only traveled back twice since then. Dworkin, the Canadian defendant, has never "been to, stopped in or passed through" Illinois. Each of the individual defendants maintains a public website obviously accessible by Illinois residents, but as we have noted, that is not enough to establish general personal jurisdiction. Finally, Wild Systems, the corporate defendant, is an Australian company located in New South Wales, Australia. It has no offices in Illinois (or anywhere in the United States, for that matter), nor has it ever had a distributor in Illinois. Since it was incorporated in 1996, Wild Systems has had a total of $8,634 in sales to customers in Illinois. These sporadic contacts with Illinois do not approach the level of "continuous and systematic" contacts necessary to establish general personal jurisdiction.

2. Specific Personal Jurisdiction

The question of specific personal jurisdiction is much more difficult. To support an exercise of specific personal jurisdiction, the defendant's contacts with the forum state must directly relate to the challenged conduct or transaction; we therefore evaluate specific personal jurisdiction by reference to the particular conduct underlying the claims made in the lawsuit. *See GCIU-Employer Ret. Fund*, 565 F.3d at 1024. Specific personal jurisdiction is appropriate where (1) the defendant has purposefully directed his activities at the forum state or purposefully availed himself of the privilege of conducting business in that state, and (2) the alleged injury arises out of the defendant's forum-related activities. *Burger King*, 471 U.S. at 472. The exercise of specific personal jurisdiction must also comport with traditional notions of fair play and substantial justice as required by the Fourteenth Amendment's Due Process Clause. *Int'l Shoe*, 326 U.S. at 316. This case primarily concerns the question whether the defendants "purposefully directed" their conduct at the forum state.

a. Conduct "purposefully directed" at the forum state

The purposeful-direction inquiry "can appear in different guises." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008). Personal jurisdiction in breach-of-contract actions often turns on whether the defendant "purposefully availed" himself of the privilege of conducting business or engaging in a transaction in the forum state. *See id.*; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). But where, as here, the plaintiff's claims are for intentional torts, the inquiry focuses on whether the conduct underlying the claims was purposely directed at the forum state. *Dudnikov*, 514 F.3d at 1071; *see also Calder v. Jones*, 465 U.S. 783, 790 (1984). In all cases the point of the purposeful-direction requirement is to "ensure that an out-of-state defendant is not bound to appear to account for merely 'random, fortuitous, or attenuated contacts' with the forum state." *Dudnikov*, 514 F.3d at 1071 (quoting *Burger King*, 471 U.S. at 475).

The Supreme Court's decision in *Calder* provides some contours for the "purposeful direction" requirement in the context of a suit alleging intentional torts. *Calder* gave significant weight to the "effects" of a foreign defendant's conduct within the forum state. In *Calder* actress Shirley Jones—star of movie musicals and the 1970s television show *The Partridge Family*—filed suit in California against the *National Enquirer*, its local distributor, and the writer and editor of an allegedly libelous article that appeared in the *Enquirer*. 465 U.S. at 785-86. The *Enquirer* is a Florida corporation headquartered in Florida, and the writer and editor were Florida residents; the individual defendants challenged personal jurisdiction in California. They argued that they were not responsible for the tabloid's distribution in California and had no economic stake in the publication's sales there, and the fact that they could foresee the article would be distributed and have an effect on Jones in California was not sufficient to confer personal jurisdiction. The Supreme Court disagreed, focusing on the effects of the article on its target in California: "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* As the Court explained,

> Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under these circumstances, petitioners must reasonably anticipate being haled into court there to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause[d] the injury in California.

Id. at 789-90 (internal quotation marks and citations omitted).

Calder thus suggests three requirements for personal jurisdiction in this context: (1) intentional conduct (or "intentional and allegedly tortious" conduct); (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the effects would be felt—that is, the plaintiff would be injured—in the forum state. *See Dudnikov*, 514 F.3d at 1072; *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998). Extracting these requirements from *Calder* is reasonably straightforward; applying them in specific cases—especially cases like this one alleging tortious acts committed over the Internet—is more challenging.[7]

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[7] The parties and the district court have approached the jurisdictional question in this case by reference to the specialized framework proposed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), for cases in which the challenged conduct occurs over the Internet. *Zippo* devised an alternative minimum-contacts test for Internet-based claims. As a general matter, the court in *Zippo* suggested that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* at 1124. More specifically, the court articulated a sliding-scale analysis that considers the degree of "interactivity" of a website to determine whether the electronic contacts with the forum are sufficient to satisfy *International Shoe's* standard:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

952 F. Supp. at 1124 (citations omitted).

Some circuits have followed *Zippo* when "electronic contacts" over the Internet are at issue. *See, e.g.*, *Revel v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002) ("This circuit has drawn upon the

1. "Intentional" acts or "intentional *and* allegedly tortious" acts

The circuits are divided over whether *Calder's* "express aiming" inquiry includes *all* jurisdictionally relevant intentional acts of the defendant or only those acts that are intentional *and* alleged to be tortious or otherwise wrongful. *Compare Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) (focusing on defendant's intentional and allegedly tortious or wrongful acts), *with Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006)

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approach of *Zippo* . . . in determining whether the operation of an internet site can support minimum contacts necessary for the exercise of personal jurisdiction."); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002) ("we adopt today the model developed in *Zippo*"); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (examining a website's level of interactivity in order to conduct the minimum-contacts analysis). We have not specifically done so, although we have considered a website's degree of interactivity in at least one personal-jurisdiction case. *See Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549-50 (7th Cir. 2004). *Jennings* did not involve intentional-tort claims, however, and therefore has limited relevance here. As a more general matter, we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet. *See Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1161 (W.D. Wis. 2004) (declining to adopt *Zippo* as a substitute for the traditional minimum-contacts analysis); C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 657-58 (2006) (arguing that "a unique test of personal jurisdiction should not be adopted for cases involving wrongs committed by means of the Internet").

(en banc) (considering all jurisdictionally relevant intentional acts); *see also Dudnikov*, 514 F.3d at 1072-73 (outlining this conflict). We need not take sides in this debate. Tamburo alleges that the individual defendants intentionally published defamatory statements on their websites or in blast emails. He further alleges that this conduct tortiously interfered with his business, constituted a trade libel, and that the defendants entered into a conspiracy to commit these wrongful acts against him. These are intentional-tort allegations, bringing this case squarely within the *Calder* formula even if the scope of the inquiry is more narrowly focused on the alleged tortious acts.

2. "Express aiming" and knowledge that plaintiff would be injured in forum state

In *Calder* the Supreme Court emphasized that the defendants were not "charged with mere untargeted negligence," but instead had "expressly aimed" their alleged libel at California, where they knew Jones lived and worked and would suffer the "brunt of th[e] injury." 465 U.S. at 789-90. As an analytical matter, *Calder's* "express aiming" inquiry overlaps with the question whether the defendant knew the plaintiff would suffer the injury in the forum state, so we consider the two requirements together.

Some circuits have read *Calder's* "express aiming" requirement fairly broadly, requiring only conduct that is "targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Others have read it more narrowly to require that the forum state be the "focal point of the tort." *Dudnikov*, 514 F.3d at 1074 n.9; *see also IMO Indus., Inc.*, 155 F.3d at 263-65 ("the *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (conduct must be "intentionally targeted at and focused on" the forum state). Our circuit hasn't firmly settled on either of these understandings of *Calder*'s "express aiming" requirement. Indeed, two of our decisions—*Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985), and *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997)—are in some tension regarding the proper reading of *Calder*.

In *Wallace* the question was whether Indiana could exercise jurisdiction over California defendants who were sued by an Indiana resident for malicious prosecution when the allegedly tortious conduct occurred exclusively in California. Applying *Calder*, we held that jurisdiction was not proper in Indiana; in so holding we focused on the relationship between the defendants' actions and the forum state itself, not just on the relationship between those actions and the plaintiff's injury. 778 F.2d at 395 (noting that the defendants did not undertake any "action that created the necessary connection with Indiana"). We concluded that *Calder* did not alter the prevailing jurisdictional requirement that the defendant must engage in conduct that "create[s] a 'substantial connection' with the forum State." *Id.*

Janmark took a broader view of *Calder*. There, shopping-cart competitors Janmark and Dreamkeeper sold mini shopping carts throughout the United States—Dreamkeeper from California and Janmark from Illinois. 132 F.3d at 1202. Dreamkeeper accused Janmark of infringing its copyright in a particular shopping-cart design, but Janmark refused Dreamkeeper's demand to stop manufacturing the carts. Dreamkeeper contacted a Janmark customer in New Jersey and threatened the customer with a contributory-infringement suit if it did not stop purchasing carts from Janmark. Janmark sued Dreamkeeper in Illinois on a variety of intentional-tort and intellectual-property theories, and we held that Illinois could exercise personal jurisdiction over Dreamkeeper. *Id.* Noting first that "the location of the injury . . . is vital to understanding where the tort occurred," we made this observation about *Calder*: "[T]here can be no serious doubt after *Calder* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *Id.* We then concluded that "inducing the customers of an Illinois firm to drop their orders can be a tort in Illinois[,] and . . . whether or not it is a tort in Illinois, it is *actionable* in Illinois." *Id.* at 1203. In other words, jurisdiction was proper in *Janmark* because the defendant's express aim was to tortiously interfere with an Illinois company's sales and because the injury occurred in Illinois.

Another case—one specifically relied on in *Janmark*—is also instructive here. *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 412 (7th Cir. 1994), involved a suit for copyright infringement by the National Football League's Indianapolis Colts against the Canadian Football League's Baltimore Colts—the latter team having been established after the NFL

Colts moved from Baltimore to Indianapolis. We held that jurisdiction in Indiana was proper under *Calder* because the Indianapolis team's injury occurred in that state and because the cable-television broadcasts of the Canadian team's games could be considered an "entry" into Indiana in the same sense that the *Enquirer*'s distribution of its tabloid was considered an "entry" into California in *Calder*. *Id.* We noted that in *Calder* and in other cases finding jurisdiction based on the *Calder* approach, "the defendant had done more than brought about an injury to an interest located in a particular state." *Id.*

Janmark is hard to reconcile with *Wallace* and to a lesser extent, with *Indianapolis Colts*—at least if *Janmark* is understood as broadly authorizing personal jurisdiction wherever a tort victim is injured.[8] Both *Wallace* and *Indianapolis Colts* read *Calder* to require a forum-state injury *and* "something more" directed at that state before jurisdiction over a foreign defendant may be considered proper. Importantly, however, the holding in *Janmark* ultimately focused on more than the fact that the injury had occurred in Illinois; *Janmark*'s jurisdictional conclusion was premised on the Illinois-based injury *and* the fact that the defendant acted with the purpose of interfering with sales originating in Illinois. Thus, despite its broad language about *Calder*, *Janmark* ultimately considered the relationship between the allegedly tortious conduct and the forum state itself. *See Nerds on Call, Inc. (Indiana) v. Nerds on Call, Inc. (California)*, 598 F. Supp. 2d 913, 919 (S.D. Ind. 2008) (Hamilton, J.) ("In [*Janmark*], the injury was in Illinois, but Janmark was specifically targeted by a California company who induced a New Jersey party to break its contract with Janmark.").

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[8] To the extent *Janmark* is understood to hold that jurisdiction is proper wherever the injury occurs, at least one of our sister circuits has questioned it. *See IMO Indus., Inc.*, 155 F.3d at 263-64 ("We believe [*Janmark*] interpreted *Calder* too broadly when it read that case to hold that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor. . . . [S]uch a broad sweep fails to accommodate *Calder*'s emphasis on the fact that the forum must be the focal point of the harm and that the defendant must expressly aim the tortious activity at the forum." (internal quotation marks and citation omitted)).

This case involves both a forum-state injury *and* tortious conduct specifically directed at the forum, making the forum state the focal point of the tort—at least with respect to the individual defendants. (We will discuss the corporate defendant in a moment.) Moreover, if the cable-television broadcasts of Baltimore Colts football games could be considered an electronic "entry" into Indiana for purposes of personal jurisdiction in *Indianapolis Colts*, then the individual defendants' use of their public websites to defame an Illinois-based businessman and exhort readers to boycott his products can likewise be conceptualized as an electronic "entry" into Illinois for jurisdictional purposes.

More specifically, Dworkin, Henry, Hayes, and Mills are each alleged to have published false and defamatory statements about Tamburo, either on their public websites or in blast emails to other proprietors of online dog-pedigree databases. In some of these messages, readers were encouraged to boycott Tamburo's products; in others, Tamburo's Illinois address was supplied and readers were urged to contact and harass him. The complaint also alleges that Dworkin personally contacted Tamburo by email, accusing him of "theft" and demanding that he remove the "stolen" data from The Breeder's Standard. Dworkin threatened to expose Tamburo's "theft" to the online dog-pedigree community if he did not comply. Dworkin, Henry, Hayes, and Mills engaged in this conduct with the knowledge that Tamburo lived in Illinois and operated his business there; their affidavits do not deny this. Thus, although they acted from points outside the forum state, these defendants specifically aimed their tortious conduct at Tamburo and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there.[9] These allegations suffice to establish personal jurisdiction over these defendants under either a broad *or* a more restrictive view of *Calder*.

The Tenth Circuit's decision in *Dudnikov* supports this conclusion. In *Dudnikov* a Connecticut-based company notified the online auction host eBay, based in California, that a line of prints featured in an eBay auction infringed its copyright. eBay responded by cancelling the auction for the prints. The online sellers of the prints lived and operated their business in Colorado; they filed a copyright suit in Colorado against the Connecticut-based company. The district court dismissed the case for lack of personal jurisdiction. 514 F.3d at 1068-69. In a comprehensive decision, the Tenth Circuit reversed. Although the Connecticut company's conduct originated outside of Colorado and was technically directed at eBay in California, its express goal was to halt sales of an online auction item originating in Colorado. This satisfied *Calder's* "express aiming" requirement and was sufficient to establish personal jurisdiction over the Connecticut company in Colorado. *Id.* at 1075. The court offered the following analogy to help explain its decision:

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[9] We note the circuits are also divided on the proper way to understand *Calder*'s emphasis on the defendant's knowledge of where the "brunt of the injury" would be suffered. *Compare Dudnikov*, 514 F.3d at 1072 (requiring the defendant to have "knowledge that the brunt of the injury would be felt in the forum state") *and IMO Indus., Inc.*, 155 F.3d at 265 (same), *with Yahoo!*, 433 F.3d at 1207 ("[T]he 'brunt' of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."). Again, we need not enter the fray; here, the whole of the injury was suffered in Illinois, and the individual defendants knew that would be the case. As we explain later, however, the same cannot be said of Wild Systems, the Australian corporate defendant.

> [The defendant's conduct] is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, defendants intended to send the [copyright notice] to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket.

Id.

Although the circumstances here are not easily analogized to a basketball bank shot, we take the

Tenth Circuit's point and agree with its analysis. Here, the individual defendants purposely targeted Tamburo and his business in Illinois with the express goal of inflicting commercial and reputational harm on him there, even though their alleged defamatory and otherwise tortious statements were circulated more diffusely across the Internet.[10] Tortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder*'s express-aiming requirement. *See Dudnikov*, 514 F.3d at 1078 ("actions that 'are performed for the very purpose of having their consequences felt in the forum state' are more than sufficient to support a finding of purposeful direction under *Calder*" (quoting *Finley v. River N. Records, Inc.*, 148 F.3d 913, 916 (8th Cir. 1998))). Accordingly, we conclude that Dworkin, Henry, Hayes, and Mills "purposefully directed" their activities at Illinois; this prerequisite for the exercise of personal jurisdiction in Illinois has been met.

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[10] In a case involving a stand alone Internet based defamation, *Calder* might require a showing that the defendant intended to reach forum-state readers. *See Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (In a suit filed by a Virginia resident in Virginia district court against Connecticut newspapers for a defamatory online news article, "[s]omething more than posting and accessibility is needed. . . . The newspapers must, through the Internet postings, manifest an intent to target and focus on [forum state] readers."). Because the newspaper in *Young* — the *New Haven Advocate* — clearly targeted a local audience, the case suggests that when a local publication posts an article on its website, jurisdiction in another state may be proper only if the publication specifically targets forum-state readers. But the analysis may be more complex when, for example, a truly national publication, such as *USA Today*, is sued for defamation arising out of an article on its website. In that context the Supreme Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), is instructive. In *Keeton* the Court held that New Hampshire could exercise jurisdiction over a nationally circulated magazine, based in Ohio, when an article in the magazine defamed a New York resident. Emphasizing that the magazine "was a national publication aimed at a nationwide audience" and that it "continuously and deliberately exploited the [New Hampshire] market," the Court concluded that "[t]here is no unfairness in calling [the magazine] to answer for [its] contents . . . wherever a substantial number of copies are regularly sold and distributed." *Id.* We note, however, that the very broad conception of jurisdiction envisioned in *Keeton* likely applies only rarely.

The same is not true, however, of Wild Systems, the Australian corporate defendant. Recall that DeJong, the owner and president of Wild Systems, allegedly facilitated the posting of some of the individual defendants' tortious messages on the company's private Breedmate Yahoo! email listserve. The complaint does not say how many, nor does it describe the content of the messages that were reposted onto the listserve. It does not allege, for example, that DeJong reposted emails specifically calling for a boycott of Tamburo's Illinois-based business. And unlike the individual defendants, there are no allegations that DeJong or anyone else associated with Wild Systems acted with the knowledge that Tamburo operated his business in Illinois or with the specific purpose of inflicting injury there. In short, we cannot conclude that DeJong's reposting of an unspecified number of messages of unspecified (but tortious) content to a private listserve of unspecified scope and reach is enough to establish that Wild Systems "expressly aimed" its allegedly tortious conduct at Illinois. As such, the claims against Wild Systems were properly dismissed for lack of personal jurisdiction.

b. Injury "arises out of" the defendants' contacts with forum state

Our conclusion that the individual defendants' conduct was "purposely directed" at the forum state does not end the jurisdictional inquiry. Tamburo's injury must "arise out of" or "relate to" the conduct that comprises the defendants' contacts with the forum. *See Burger King*, 471 U.S. at 472. The Supreme Court has not elaborated on this requirement, *see Helicopteros*, 466 U.S. at 415 n.10, and the occasional difficulty in applying it has led to conflict among the circuits.[11]

The First Circuit has held that at least with respect to intentional tort claims, the defendant's contacts with the forum must constitute both the cause in fact and the proximate cause of the injury. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998). The Ninth and Fifth Circuits, on the other hand, require only that the contacts constitute a but-for cause of the injury. *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1051 n.7 (9th Cir. 1997); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981); *see generally Dudnikov*, 514 F.3d at 1078 (outlining this conflict); *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 102-05 (3d Cir. 2004) (Scirica, C.J., concurring in part and dissenting in part) (same).

The Third Circuit has taken a middle-ground approach, holding that "specific jurisdiction requires a closer and more direct causal connection than that provided by the but-for test," but has not adopted a precise rule, opting instead to proceed on a case-by-case basis. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007). Because personal jurisdiction can be conceptualized as a quid pro quo by which the defendant submits to the forum's jurisdiction in exchange for the benefit of its laws, the Third Circuit suggests that "[t]he causal connection can be somewhat looser than the tort concept of proximate causation, but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable." *Id.* (citation omitted).

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[11] The Supreme Court granted certiorari on this issue in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991), but decided the case on other grounds.

We have not weighed in on this conflict and need not do so here.[12] Under even the most rigorous approach to the determination of whether the plaintiff's injury "arises out of" the defendant's contacts with the forum state, Tamburo's injury clearly does. We have already concluded that Dworkin, Henry, Hayes, and Mills expressly aimed their allegedly tortious conduct at Tamburo and his Illinois-based business for the purpose of causing him injury there;

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[12] An additional approach, adopted by the Second Circuit, is a sliding-scale analysis that considers the connection between the contacts and the lawsuit. *See Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998). Under this analytical framework, "the relationship between the contacts and the suit can be weaker when the contacts themselves are more extensive." *Dudnikov*, 514 F.3d at 1078 (discussing this approach). We rejected this approach in *RAR*, instead concluding that aggregating contacts in this manner would not provide a defendant adequate notice that a particular transaction or act would subject him to the forum state's jurisdiction. 107 F.3d at 1277; *see also Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 716-17 (7th Cir. 2002).

these "contacts" with the forum state are the cause in fact and the legal cause of Tamburo's injury. That is, Tamburo's claims arise directly out of the individual defendants' contacts with Illinois. *See RAR*, 107 F.3d at 1278 (in a contract case, holding that "the action must *directly arise* out of the specific contacts between the defendant and the forum state'" (quoting *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1999) (emphasis added in *RAR*))).

c. Traditional notions of fair play and substantial justice

Our final inquiry is whether Illinois' exercise of personal jurisdiction over Dworkin, Henry, Hayes, and Mills would offend traditional notions of fair play and substantial justice. *See Int'l Shoe*, 326 U.S. at 316. The following factors are relevant: "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 477 (internal quotation marks omitted). Applying these factors here, we see no unfairness in permitting this suit to proceed against the individual defendants in Illinois.

First, Illinois has a strong interest in providing a forum for its residents and local businesses to seek redress for tort injuries suffered within the state and inflicted by out-of-state actors. Although Tamburo could have sued the individual defendants in their home jurisdictions, that would have been cumbersome and impractical; the American defendants live in separate states and Dworkin lives in Canada. Neither Canada nor any of the states where the American defendants live (Colorado, Michigan, or Ohio) has a substantial interest at stake here. And it would be unreasonable to expect Tamburo to file separate lawsuits to give each defendant the privilege of defending this litigation in his or her home state when jurisdiction is otherwise proper in Illinois. Under these circumstances, it is far more reasonable to conclude that the defendants should anticipate being haled into court in Tamburo's home state of Illinois than a court in a codefendant's home jurisdiction. A single suit in Illinois also promotes the most efficient resolution of these claims. *See Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49, 54 (7th Cir. 1996). Accordingly, we conclude that the exercise of personal jurisdiction in Illinois over Dworkin, Henry, Hayes, and Mills comports with traditional notions of fair play and substantial justice.

For the foregoing reasons, we AFFIRM the district court's order dismissing all counts against Wild Systems for lack of personal jurisdiction and also AFFIRM the dismissal of the antitrust claims against all defendants for failure to state a claim. We REVERSE the district court's order dismissing the state-law tort claims against Dworkin, Henry, Hayes, and Mills for lack of personal jurisdiction and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

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FINAL JUDGMENT

April 8, 2010

BEFORE: WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No.: 08-2406	JOHN F. TAMBURO doing business as MAN'S BEST FRIEND SOFTWARE and VERSITY CORPORATION, Plaintiffs - Appellants v. STEVEN DWORKIN, KRISTEN HENRY, ROXANNE HAYES, et al., Defendants - Appellees

Originating Case Information:
District Court No: 1:04-cv-03317 Northern District of Illinois, Eastern Division District Judge Joan B. Gottschall

We **AFFIRM** the district court's order dismissing all counts against Wild Systems for lack of personal jurisdiction and also **AFFIRM** the dismissal of the antitrust claims against all defendants for failure to state a claim. We **REVERSE** the district court's order dismissing the state-law tort claims against Dworkin, Henry, Hayes, and Mills for lack of personal jurisdiction and **REMAND** the case for further proceedings. Costs are awarded to the plaintiffs-appellants. This in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 3317
Judge Joan B. Gottschall

[Filed May 9, 2008]

JOHN F. TAMBURO, d/b/a MAN'S
BEST FRIEND SOFTWARE and
VERSITY CORPORATION,

Plaintiffs,

v.

STEVEN DWORKIN; KRISTEN
HENRY; ROXANNE HAYES;
KAREN MILLS; and WILD
SYSTEMS PTY. LTD, an
Australian corporation,

Defendants.

ORDER

On October 9, 2007, the court dismissed plaintiffs John F. Tamburo, d/b/a Man's Best Friend Software and Versity Corporation's (collectively "Tamburo") sixth amended complaint for lack of personal jurisdiction. Presently before the court is Tamburo's motion to vacate the court's order and to transfer this case to the Southern Division of the Western District of Michigan. For the reasons set forth below, Tamburo's motion to vacate and transfer is denied.

I. ANALYSIS

A district court may transfer a case to another district if it finds that it lacks personal jurisdiction in its own. 28 U.S.C. § 1404(a). Typically, it is the defendant who moves to transfer a case: the plaintiff, after all, is the party who initially selects the forum in which to litigate his claim. Section 1404(a) states that: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The statutory language has generally been interpreted to permit defendants to transfer their suit, with leave of the court, to a more appropriate or convenient forum.

However, in cases where a plaintiff has inadvertently filed suit in a forum where the court lacks personal jurisdiction over the defendants, the court may also transfer the case. Under 28 U.S.C. § 1406(a), "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." The Seventh Circuit has observed that if a court can transfer a case from a forum where venue is improper under § 1406(a), then it may also transfer a case on the plaintiff's motion if the forum in which the case was filed lacks personal jurisdiction over the defendants under § 1404(a). *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986) ("[I]t seems to us that a transfer under section 1404(a) is proper in the same circumstances that it would be if venue had been improper, notwithstanding the small difference in wording between 1404(a) and 1406(a)").[1]

Furthermore, the Seventh Circuit, citing *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467 (1962), has held that the statute's phrase "in the interests of justice" includes situations in which a plaintiff has mistakenly filed suit in a forum that lacks personal jurisdiction over the defendants, and plaintiff would be time-barred from filing his claims in another forum where jurisdiction exists by the statute of limitations. *Cote*, 796 F.2d at 984-85. In the instant case, Tamburo filed his original complaint on May 11, 2004, and any claims arising from events prior to that filing are now more than likely time-barred, preventing Tamburo from filing in a district court where venue is proper and personal jurisdiction can be established. Furthermore, although the court rejects Tamburo's contention that the court's decision to dismiss for lack of personal jurisdiction was a "close one," issues of federal personal jurisdiction, particularly with respect to internet transactions, are complex, and may appear baffling to pro se litigants lacking the benefit of a legal education.[2] The court, in its broad discretion with respect to this subject, does not believe that Tamburo's pro se mistake of filing his suit in this district was so "elementary" that it merits denial of his motion to transfer. *See Carpenter-Lenski v. Ramsey* , No. 99-3367, 2000 WL 287651, at *3 (7th Cir. Mar. 14, 2000) (district court did not abuse its discretion in denying transfer where plaintiff had disregarded the "elementary" issue of whether personal jurisdiction was proper); *Hapniewski v. City of Chicago Heights*, 883 F.2d 576, 579 (7th Cir. 1989) (plaintiffs pursued their action in federal court in Indiana despite their knowledge that all parties were citizens of Illinois). The court feels, therefore, that the interests of justice favor transferring this case.

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[1] Tamburo also argues that transfer is proper under 28 U.S.C. § 1631. There has been considerable debate over whether § 1631 applies to cases where personal jurisdiction is lacking. Several courts, particularly the Tenth Circuit, have held that § 1631 applies in cases where either subject matter jurisdiction or personal jurisdiction is lacking. *See, e.g., Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 793 (10th Cir. 1998); *Ross v. Colorado Outward Bound Sch., Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987). Other courts, however, have held that § 1631 applies only to cure defects of subject matter jurisdiction. *See, e.g., Pedzewick v. Foe*, 963 F.Supp. 48, 50 (D. Mass. 1997); *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51-52 (N.D.N.Y. 1988); *Nose v. Rementer*, 610 F. Supp. 191, 192 n.1 (D. Del. 1985). The Seventh Circuit has yet to provide guidance on this issue, however the court need not address it at present, since it finds that transfer is proper under 28 U.S.C. § 1406(a). *See Carpenter-Lenski v. Ramsey*, No. 99-3367, 2000 WL 287651, at *2 (7th Cir. Mar. 14, 2000). One subsequent case in this district has stated, without citation of precedent or other supporting legal authority, that § 1631 is applicable. *Torco Holdings, Inc. v. P&M Aircraft Co., Inc.*, No. 00 C 322070, 2001 WL 322070, at *2 (N.D. Ill. Mar. 30, 2001). Plaintiffs' assertion that transfers under § 1631 for want of personal jurisdiction have been explicitly held to be permissible in the Sixth Circuit, although correct, is irrelevant, because it is the law of the transferor court that is controlling. *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003).

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[2] Tamburo is currently ably represented by counsel; however in Tamburo's original filing in this case, he represented himself as a pro se litigant.

Venue is proper in the Western District of Michigan with respect to defendant Roxanne Hayes ("Hayes"), who Tamburo alleges is a citizen of Michigan residing in that district. Pl.'s Mem. in Supp. at 1. Moreover, Tamburo alleges that Hayes was an integral member of the alleged internet conspiracy against him. *Id.* at 2. The other defendants are citizens of Colorado, Ohio, and two foreign countries, and the events forming the basis of this suit allegedly took place on various internet chat rooms and users' groups. *Id.* at 4. Venue is therefore proper in the Western District of Michigan. *See* 28 U.S.C. §1391(a)(2-3).

The court must also consider the convenience of the transfer to the parties in the suit. *Bodine Elec. Co. v. Int'l Res. and Dev. Corp.*, No. 92 C 83891993, 1993 WL 278524, at *2 (N.D. Ill. July 23, 1993). In this case, the inconvenience to Tamburo is increased slightly because he will pursue his claim in an adjacent state; however, it is he who is requesting the transfer. The transfer will be conversely slightly more convenient to Hayes, who will litigate in her home district. The difference in inconvenience to the remaining defendants would be nugatory; the court suspects that it makes little difference, *e.g.*, to the Australian defendant whether the litigation is conducted in Chicago or across the lake in Michigan. The court finds, therefore, that the issue of the relative convenience of transfer to the parties is of no significant importance to this decision.

Finally, Tamburo argues that transfer is appropriate because Hayes is subject to personal jurisdiction in the proposed transferee court, and her co-defendants are also subject to personal jurisdiction under a "conspiracy theory of jurisdiction." Under

§ 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The language "where it might have been brought" is generally recognized to mean that the transferee court must be able to exert personal jurisdiction over the defendants. *Torres v. The S.S. Rosario*, 125 F. Supp. 496 (S.D.N.Y. 1954), *mand. denied*, 221 F.2d 319, *cert. denied* 350 U.S. 836. In cases based upon diversity of citizenship, this means that the defendant must be amenable to service of process issued by the transferee court, in this case, the district court in the Western District of Michigan. *Cunningham v. Cunningham*, 477 F. Supp. 632, 634 (N.D. Ill. 1979).

A problem arises, however, when there are multiple defendants, and one or more are not amenable to service by the transferee court, either directly or under the applicable long-arm statute. In such cases, the transferor court lacks the power to transfer the case. *Relf v. Gasch*, 511 F.2d 804, 807-08 (D.C. Cir. 1975); *Gallery House, Inc. v. Yi*, 587 F.Supp. 1036, 1039 (C.D. Ill. 1984) (In case involving multiple defendants, transfer may not be made if one of the defendants is not subject to suit in the transferee's district). Tamburo enlists *Wild v. Subscription Plus, Inc.*, 292 F.3d 529, 530-31 (7th Cir. 2002) in support of his contention that transfer is proper despite the fact that only one of the defendants resides in the Western District of Michigan. Tamburo quotes the language of *Wild* to suggest that transfer is proper, even if one or more defendants cannot be served either directly or via the transferee court's applicable long-arm statute:

> [W]e do not agree … that a transfer is invalid … just because one defendant in a multidefendant

> case ... cannot be served either directly or under a long-arm statute in the transferee district. Were there only one defendant and he or she could not be served there, it would be plain that the suit "could not be brought" there and so transfer would be improper.

Id. (internal citations omitted). Tamburo's reading of *Wild*, however, is highly and selfservingly selective, for the appellate court goes on to say:

> But that leaves the question whether a defendant in a multidefendant suit who cannot be served can be forced to defend in the transferee district or, as most cases hold, must be severed from the rest of the suit and the suit against him either dismissed or ... transferred back to the district in which the suit was first filed or to a district in which service upon him is possible .... The argument for the latter course ... is that the transfer statutes do not purport to alter the rules governing personal jurisdiction; and of course the outer bounds of those rules are set by the Constitution.

Id. at 531. The appellate court went on to find that the district court's dismissal of the defendant who was not amenable to process in the suit was proper. *Id.* at 531-32.

In short, *Wild* does not support Tamburo's argument that the case can be transferred despite the fact that all save one of the defendants are not amenable to service in the Western District of Michigan. Rather, it supports the notion that the case might be transferred with respect to Hayes alone; the other defendants could be either severed from the case, transferred to a district court in which service against those defendants is possible, or returned to this court, in which the case was initially filed. The latter course of action is not possible because this court has already found that it lacked personal jurisdiction in this case.

However, Tamburo also argues that personal jurisdiction over all of the defendants is proper because Hayes is a citizen of Michigan and the other defendants are liable under a "conspiracy theory of jurisdiction." The Sixth Circuit has neither expressly adopted nor rejected such a theory of jurisdiction, under which the acts of a coconspirator, performed in the forum state in furtherance of the conspiracy, constitute sufficient minimum contacts to establish personal jurisdiction over an absent coconspirator who has no other contact with the forum. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236-37 (6th Cir. 1981); *but see General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F.Supp. 656, 665-66 (E.D.Mich. 1996) (adopting the test). However, the court need not agonize long over whether such a theory of jurisdiction is acceptable in the Western District of Michigan, because it has already found that Tamburo's complaint does not allege sufficient facts to support a conspiracy theory of personal jurisdiction over the defendants. *See Tamburo v. Dworkin*, No. 04 C 3317, 2007 WL 3046216, at *8 (N.D. Ill. Oct. 9, 2007). Because Tamburo cannot demonstrate that his suit might have been properly brought against any of the defendants, except Hayes, in the Western District of Michigan, his motion to vacate and transfer is denied.

II. CONCLUSION

For the reasons set forth above, Tamburo's motion to vacate the court's order of dismissal of this case for lack of personal jurisdiction and to transfer this case to the Southern Division of the Western District of Michigan is denied.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: May 9, 2008

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 3317
Judge Joan B. Gottschall

[Filed October 9, 2007]

JOHN F. TAMBURO, d/b/a MAN'S BEST FRIEND SOFTWARE and VERSIT CORPORATION,	)
Plaintiff,	)
v.	)
STEVEN DWORKIN; KRISTEN HENRY; ROXANNE HAYES; KAREN MILLS; and WILD SYSTEMS PTY. LTD. an Australian corporation,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Defendants Steven Dworkin, Kristen Henry, Roxanne Hayes, Karen Mills, and Wild Systems Pty. Ltd. have filed this motion to dismiss plaintiffs John F.

Tamburo and Versity Corporation's sixth amended complaint alleging lack of personal jurisdiction and failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion to dismiss for lack of personal jurisdiction is granted and the motion to dismiss for failure to state a claim upon which relief can be granted is denied as moot.

BACKGROUND

Plaintiffs John F. Tamburo ("Tamburo") d/b/a Man's Best Friend Software ("MBFS") and Versity Corporation ("Versity") have sued four individuals, who are not citizens of Illinois, and an Australian corporation under numerous legal theories for losses MBFS allegedly incurred arising out of disputes as to ownership of the contents of online dog pedigree databases.[1] Presently before the court is the defendants' joint motion to dismiss plaintiffs' sixth amended complaint, which argues that the court lacks general or specific personal jurisdiction over the defendants. Further, the defendants allege that the plaintiffs have failed to state claims upon which relief can be granted and that therefore the complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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[1] A more detailed version of the facts of this case can be found in the court's orders addressing defendant's motions to dismiss the plaintiffs' first through fifth amended complaints and need not be further rehearsed herein.

Personal Jurisdiction

In cases based upon diversity of citizenship, federal district courts sitting in Illinois have personal jurisdiction over nonresident defendants only to the extent that Illinois courts would have jurisdiction.[2] *Edelson v. Chi'en*, 352 F. Supp. 2d 861, 865-66 (N.D. Ill. 2005); *Interlease Aviation Investors LLC v.*

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[2] In their complaint, plaintiffs also allege claims arising under federal law, *viz.*, seeking declaratory judgment 28 U.S.C. § 2201 (Count 1) and violation of federal antitrust statutes, 15 U.S.C. § 1 *et seq.* (Count 11). In its order of August 3, 2006 concerning defendants' motion to dismiss plaintiffs' fifth amended complaint, the court noted that the there is considerable uncertainty, reflected in a circuit split, as to whether the Sherman Act authorizes nationwide service of process when suit is brought in a district other than that where the defendant resides, is found, or transacts business, and the resulting impact of that uncertainty upon the potential personal jurisdiction of the court over the defendants in this case (the Seventh Circuit has not yet held upon the issue). *See Sanderson v. Spectrum Labs*, 248 F.3d 1159 (Table) 2000 WL 1909678 at *3 (7th Cir. Dec. 29, 2000) (declining to decide the issue); *see also and compare GTE Media Servs., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir 2000) *with Go-Video, Inc. v. Akai Elec. Co.*, 885F.2d 1406, 1414-16 (9th Cir, 1989). Moreover, the Act authorizes worldwide service of process only on corporations and not on private individuals, and thus applies only to defendant Wild Systems Pty. Ltd. 15 U.S.C. § 22, *see also United Phosphorus, Ltd. v. Angus Chemical Co.*, 43 F. Supp. 2d 904, 911 (N.D. Ill. 1999). The court directed the defendants to file a renewed motion to dismiss for lack of personal jurisdiction addressing whether the federal antitrust statutes authorize nationwide service of process in this case. Neither the defendants nor the plaintiffs, in their response, have substantially briefed this issue with respect to the motion under consideration. In view of the court's resolution of the personal jurisdiction issues in this order, there is no need at this time to resolve the issue of whether worldwide service of process is permitted.

Vanguard Airlines, Inc., 262 F. Supp. 2d 898, 905 (2003); *See also DeLuxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1212 (7th Cir. 1984). In Illinois, courts have personal jurisdiction over nonresident defendants if permitted by: (1) Illinois statutory law; (2) the Illinois Constitution; and (3) the Constitution of the United States. *Id.*

The Illinois long-arm statute currently extends personal jurisdiction to the limit permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS 5/2-209(c); *See also Vanguard Airlines*, 262 F. Supp. 2d at 905 (citing *LaSalle Bank Nat'l Ass'n v. Epstein*, No. 9 C 7820, 2000 WL 283072 at *1 (N.D. Ill. Mar 9, 2000). Moreover, the Seventh Circuit has stated that "there is no operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction" and that not since the Illinois Supreme Court's 1990 *Rollins* decision has an Illinois court encountered a case in which federal due process requirements permitted personal jurisdiction and Illinois due process requirements prohibited it. *Hyatt International Corp. v. Coco*, 302 F. 3d 707, 715-16 (7th Cir. 2002). Thus, the three requirements for personal jurisdiction collapse into a single analysis. Consequently, other courts of the Seventh Circuit have conducted only a federal due process analysis in determining whether personal jurisdiction may be exerted over nonresident parties. *Vanguard Airlines*, 262 F. Supp. 2d at 906 (citing *Cont'l Cas. Co. v. Marsh*, No. 01 C 0160, 2002 WL 31870531 at *4 (N.D. Ill. Dec. 23, 2002)); *United Fin. Mortgage Corp. v. Bayshores Funding Corp.*, 245 F. Supp. 2d 884, 891-92 (N.D. Ill. 2002)).

Federal due process requirements prescribe that nonresident defendants have sufficient minimum contacts with the forum state such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Hyatt*, 302 F.3d at 713 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The standard of "minimum contacts" depends upon whether general or specific personal jurisdiction is alleged. *Vanguard Airlines*, 262 F. Supp. 2d at 906 (citing *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997). The defendants' motion to dismiss argues that this court has neither general nor specific personal jurisdiction over any of the defendants, all of whom are nonresidents. The court addresses each type of jurisdiction in turn for each defendant.

General Personal Jurisdiction

For purposes of personal jurisdiction under the Illinois long-arm statute, general jurisdiction applies only when a nonresident defendant has had continuous and systematic general business with the forum state such that it demonstrates a purpose on the part of the defendant to avail herself of the protection of Illinois law. *RAR*, 107 F.3d at 1277; *First Nat'l Bank v. El Camino Resources, Ltd.*, 447 F. Supp 2d 902, 906 (N.D. Ill. 2006). Although there is no "bright line rule" for determining whether a defendant's business contacts with the forum are continuous and systematic, the standard is quite high; requiring a showing that the defendant is conducting business that is fairly permanent and continuous, and of such character and extent as to justify the inference that the defendant has subjected himself to the jurisdiction and laws of the forum. *Laiquat Khan v. Van Remmen,* *Inc.*, 756 N.E.2d 902, 907 (Ill. App. Ct. 2001); *Alderson v. Southern Co.*, 747 N.E.2d 926, 940 (Ill. App. Ct. 2001). Thus, the Illinois long-arm statute demands a "course of business" or "regularity of activities" as opposed to isolated or sporadic contacts or transactions. *Alderson*, 747 N.E.2d at 940 (quoting *Gaidar v. Tippecanoe Distribution Serv., Inc.*, N.E.2d 316, 320 (Ill. App. Ct. 1998); *Radosta v. Devil's Head Ski Lodge*, 526 N.E.2d 561, 564 (Ill. App. Ct. 1988)).

Moreover, although a plaintiff need only make a prima facie case demonstrating general personal jurisdiction, it is not enough that a plaintiff simply allege that the defendant has such a connection when the defendant presents facts to the contrary, and it is not acceptable to require a nonresident to defend herself against a claim when she has alleged facts which, if true, would negate the jurisdiction, without determining what the facts are. *TCA Intern., Inc. v. B & B Custom Auto, Inc.*, 701 N.E.2d 105, 113 (Ill. App. Ct. 1998).

Defendant Wild Systems Pty. Ltd.

Defendant Wild Systems Pty. Ltd. ("Wild") is a corporation organized under the laws of Australia. Wild's products are sold via a website (www.breedmate.com) ("Breedmate") through which its breeding and bloodline database products may be purchased online. Wild does not have an Illinois distributor or agent, and approximately 1% of Wild's sales via its website are to customers located in Illinois. No facts have been adduced by the plaintiffs to suggest that Wild's website is targeted deliberately or specifically at Illinois consumers. Generally, the mere maintenance of a website, even an interactive one through which orders may be placed, is not sufficient in itself to establish general jurisdiction over a foreign defendant. *Euromarket Designs, Inc. v. Crate & Barrel, Ltd.*, 96 F.Supp.2d 824, 933 (N.D. Ill. 2000); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Thus, Wild's maintenance of a website through which products may be ordered by Illinois customers does not constitute, in itself, sufficiently continuous and systematic business activity to establish general jurisdiction by this court.

Defendant Dworkin

Plaintiffs allege that defendant Steven Dworkin ("Dworkin") is engaged in the business of breeding dogs and registering them with the American Kennel Club ("AKC"), a New York corporation. Plaintiffs allege, *inter alia*, that Dworkin's dogs have competed in sundry dog shows in the United States, that Dworkin has sold dogs to individuals in the United States and maintains an email address through which he corresponds with individuals in the course of such business, and that Dworkin has maintained an "interactive" website (www.keesdog.com). Nowhere, however, do they allege that Dworkin has had any continuous and systematic contact, or even a single business transaction, with even a single individual in the state of Illinois. Absent an allegation of continuous and systematic business activity with even so much as a single customer, this court that cannot find that it may exert general jurisdiction over Dworkin.

Defendants Henry, Mills, and Hayes

As with Dworkin *supra*, Plaintiffs allege that Kristen Henry ("Henry"), Karen Mills ("Mills"), and

Roxanne Hayes ("Hayes") are in the business of breeding dogs within the United States and registering them with the AKC. Plaintiffs further allege that Henry, Mills, and Hayes have individually shown their dogs in multiple shows in Illinois and may individually have sold some of their dogs to customers in Illinois. However, no facts have been adduced by the plaintiffs to suggest that Henry's, Mills' or Hayes' occasional dog show exhibitions, or their occasional sales of dogs to Illinois residents, are targeted deliberately or specifically at Illinois consumers. Transactions occurring merely casually or in isolation are not sufficient to rise to the level of permanence and continuity requisite to establish general jurisdiction in Illinois. *Bolger v. Nautica Int'l, Inc.*, 861 N.E.2d 666, 670 (Ill. App. Ct. 2007); *Recycling Sciences Int'l, Inc v. Soil Restoration and Recycling, LLC*, 159 F. Supp. 2d 1095, 1098 (N.D. Ill. 2001). Since plaintiffs do not allege facts that establish continuous and systematic business activity targeted at citizens of Illinois, but merely occasional opportunistic sales and exhibitions at dog shows located in Illinois, the court cannot find that general jurisdiction can be exerted over Henry, Mills, or Hayes.

Specific Personal Jurisdiction

Under the Illinois long-arm statute, a court may exert specific jurisdiction over a nonresident defendant if the defendant has (1) purposefully established minimum contacts with the state; (2) if the cause of action arises out of, or is related to, the defendant's contacts with the forum; and (3) if the exertion of jurisdiction is constitutionally reasonable. *United Phosphorus Ltd. v. Angus Chemical Co.*, 43 F. Supp. 2d 904, 912 (N.D. Ill. 1999); *RAR*, 107 F.3d at 1277;

Logan Products v. Optibase, 103 F.3d 49, 52 (7th Cir. 1996). The United States Supreme Court has delineated two means by which the requisite minimum contacts may be established for purposes of specific jurisdiction: (1) purposeful availment by the defendant of the benefits and protections of the laws of the forum state; and (2) harm to an individual within the state where the harm is both intentional and aimed at the forum state. *Hy Cite Corp. v. BadBusiness Bureau.Com*, 297 F. Supp. 2d 1154, 1163 (W.D.Wis. 2004) (citing *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 109 (1987); *Calder v. Jones*, 465 U.S. 783, 788-90 (1984)).

Plaintiffs have argued that the facts alleged in the discussion *supra* concerning general jurisdiction are also sufficient to permit this court to exert specific jurisdiction over each of the defendants: Wild because of its business transacted with Illinois citizens via its Breedmate website; and Henry, Mills, and Hayes via their occasional participation in dog shows in Illinois and alleged isolated sales of their dogs to Illinois citizens. Plaintiffs, in their complaint, have failed to allege a single business transaction by Dworkin targeted at a citizen of Illinois, nor do they allege that Dworkin transacts any business at all via his "interactive" website.

A single business transaction, or even a solicitation of business, may be sufficient to establish specific jurisdiction by an Illinois court over a nonresident defendant. *Traveler's Health Ass'n v. Commonwealth of Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 648 (1950); *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 281 (7th Cir. 1990); *J. Walker & Sons v. DeMert &*

Dougherty, Inc., 821 F.2d 399, 402 (7th Cir. 1987). However, plaintiffs' claim that these isolated and individual contacts are sufficient to establish specific jurisdiction over the defendants is a red herring. To establish specific jurisdiction, even a single transaction by the defendant must (1) give rise to the cause of action that is the basis of the suit; and (2) be one by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state and voluntarily invokes the benefits and protections of Illinois law. *Dilling v. Sergio*, 635 N.E.2d 590, 594 (App. Ct. Ill. 1990). Thus, there must be a causal nexus between the transaction and the cause of action. *See Hy Cite*, 297 F. Supp. 2d at 1165-65.

The claims asserted by the plaintiffs in their complaint do not arise from, nor are they in any way related to, defendants Henry's, Mills', and Hayes' alleged sales of dogs to citizens of Illinois, nor from their occasional appearances at Illinois dog shows. Nor do they arise from, nor are they related to, Wild's internet sales of canine bloodline software to sundry Illinois citizens. Rather, the plaintiffs claim that the source of their alleged injuries are statements posted to various internet bulletin boards and email user's lists and on Henry's, Mills', and Hayes' noncommercial pedigree database websites. As such, even if the defendants' contacts with Illinois were sufficient to establish minimum contacts, the crucial nexus between the various transactions and the plaintiffs' claims is absent. Therefore, those transactions cannot form the basis of specific jurisdiction over the defendants.

The question of specific jurisdiction thus turns on whether the posting of the alleged injurious statements on internet bulletin boards and on the defendants' pedigree websites constitutes sufficient minimum contact with Illinois so as to justify the court's exerting specific jurisdiction over the defendants.

Internet Chat Groups and Specific Jurisdiction

Plaintiffs allege that defendants Dworkin, Henry, Mills and Hays circulated public messages to "numerous Internet chat groups" allegedly accusing plaintiffs of "theft", "selling stolen goods," and "hacking." Plaintiffs' Memorandum of Law in Opposition to Defendants' Third Motion to Dismiss, p. 3. However, the posting of allegedly injurious messages to public internet chat groups is insufficient, in and of itself, to establish minimum contacts with Illinois adequate to justify the exertion of specific jurisdiction. *Kovacs v. Jim*, No. 02 C 7020, 2002 WL 31507172 at *2 (N.D. Ill. Nov. 12, 2002).

The Seventh Circuit has not yet directly addressed the issue of specific jurisdiction arising from internet use, but most courts have followed the "sliding scale" analysis established in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1123-24 (W.D.Pa. 1997); *See, e.g.*, *Jackson v. California Newspaper Partnership*, 406 F. Supp. 2d 893, 897 (N.D. Ill. 2005); *Bombliss v. Cornelsen*, 824 N.E.2d 1175, 1180 (Ill. App. Ct. 2005); *Euromarket Designs*, 96 F.Supp.2d at 837-38; *Watchworks, Inc. v. Total Time, Inc.*, No. 01 C 5711, 2002 WL 424631 at *5; *School Stuff, Inc. v. Sch Stuff, Inc.*, No. 00 C 5593, 2001 WL 558050 at *3 (N.D. Ill. May 21, 2001); *but see Hy Cite*, 297 F. Supp. 2d at 1160

(interactivity of a website cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action or unless contacts are systematic and continuous).

Under the *Zippo* analysis, a given website occupies a position on a spectrum ranging from "interactive" to "passive." Interactive websites are those wherein contracts are completed online with residents of a foreign jurisdiction, and the defendant receives profit directly from web-related activity. *Euromarket Designs*, 96 F.Supp.2d at 837 (citing *Zippo*, 952 F. Supp. at 1124). Such websites have been generally found to be purposefully directing their business activities at the forum state, and courts in the forum state can therefore exert specific jurisdiction. *Euromarket Designs*, 96 F.Supp.2d at 837. At the opposite end of the spectrum are purely passive websites in which a defendant has simply posted information regarding their company or activities on an Internet website which is accessible to users in foreign jurisdictions; generally these are held to be insufficiently directed at the forum state to result in the exertion of specific jurisdiction. *Id.* at 838. In between these two ends of the spectrum are interactive websites where a user can exchange information with the host computer. *Id.* at 837. In such cases, the level of interactivity is measured "by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Website." *Id.* (quoting *Zippo*, 952 F. Supp. at 1124).

With respect to the position of the internet chat room and e-mail discussion lists on the sliding scale, such internet forums would appear to be located even below the bottom limits of the passive category.

Kovacs, No. 02 C 7020, 2002 WL 31507172 at *2. The plaintiffs make no claim that the defendants are owners or operators of the chat rooms[3], that they use them to transact business directly, or that they are targeted specifically at Illinois citizens. Defendants' activity, rather, consists of posting public messages to the internet sites from their respective locations outside of Illinois, permitting those with access to the sites to read the material. *Id.* Were this to be a basis for specific jurisdiction, such jurisdiction would be ubiquitous because access to a given website is not limited by geography. *See, e.g., Hy Cite*, 297 F. Supp. 2d at 1159; *Digital Control, Inc., v. Boretronics, Inc.*, 161 F. Supp. 2d 1183, 1186 (W.D.Wash. 2001); *Millenium Enterprises, Inc. v. Millenium Music, LP*, 33 F. Supp. 2d 907, 922 (D.Or. 1999).

Defendants' Websites and Specific Jurisdiction

With respect to the defendants' websites, although both sides agree that the websites are interactive, they disagree on the degree of interactivity and whether the websites are commercial.

Defendant Henry's website

Henry's website is characterized by both plaintiffs and defendants as "partly interactive" (falling somewhere in the middle of the *Zippo* spectrum) because it "permits people to enter and search for animal pedigrees". Plaintiffs' Memorandum of Law in Opposition to Defendants' Third Motion to Dismiss, p. 18; *See Bombliss*, 824 N.E.2d at 1180. The court disagrees. According to *Bombliss*, such partial interactivity requires that customers in foreign jurisdictions be able to communicate regarding the defendant's services or products. *Id.* On the face of plaintiffs' claims, and their response to this motion, the only functions of the website are to allow individuals to retrieve information concerning pedigree lines. Entering search delineators does not rise to the level of communication concerning products or services; it merely serves as a convenience for website visitors in locating the desired specific information, much as an index would. Since it fails to meet the intermediate interactivity requirements of the Zippo analysis, Henry's website must be considered passive and therefore specific jurisdiction cannot arise from any putative contacts between citizens of Illinois and the website.

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[3] The public chat rooms and internet discussion lists named by plaintiff Tamburo in his affidavit are breedmate@yahoo groups.com and apdug@yahoogroups.com,, keeshond-l@apple. ease.lsoft.com, Although individuals may be referred to other domains to purchase products, no business transactions are carried out directly through these discussion groups.

Defendants Hayes' and Mills' Websites

Plaintiffs further contend that Hayes' and Mills' websites are fully interactive and therefore that Hayes and Mills are therefore subject to this court's specific jurisdiction. A "fully interactive" website is one in which contracts are completed online with residents of a foreign jurisdiction, and the defendant receives profit directly from web-related activity. *Euromarket Designs*, 96 F.Supp.2d at 837 (citing *Zippo*, 952 F. Supp. at 1124). Plaintiffs base these claims on the assertion that both Hayes and Mills solicit donations to assist in defraying operating expenses, and that Hayes provides sequential preference in adding pedigree data to her site to individuals who donate to the site.

However, in the case of Mills, her website upon which the allegedly tortious statements were made (www.patriotgold.com) ("patriotgold") is not the same as that which plaintiffs claim is fully interactive because it solicits donations (www.poodlepedigree.com) ("poodlepedigree"); rather it is merely linked to it. Plaintiffs do not assert any facts to support their contention that the patriotgold website is fully, or even partially, interactive, apart from the link to the poodlepedigree site.

It is more reasonable to locate all of these websites in the middle of the *Zippo* spectrum. Such sites "allow visitors to post messages (to which [d]efendants sometimes respond) ... and make donations." *George S. May Intern'l Co. v. Xcentric Ventures, LLC*, 409 F. Supp. 2d 1052, 1059 (N.D.Ill 2006). For such websites, "the likelihood that personal jurisdiction can be exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet." *Zippo*, 952 F. Supp. at 1124.

Plaintiffs' attempts to characterize Hayes' and Mills' websites as being "commercial" in nature are misleading. No products or services are sold via the websites. None of the websites *requires* payment for providing uploading pedigree information into the database or for pedigree analysis. Although they solicit donations to assist in the support of the various websites (and, in the case of Hayes, provides sequential preference to donors in uploading their pedigree information), any such donation is strictly voluntary. Plaintiffs do not allege that payment is required, or even expected, for access to the defendants' databases. However, even in the unlikely eventuality that the websites could be considered to be commercial, and to require payment in return for services provided, plaintiffs have failed once again to allege any credible nexus between the alleged tortious acts of the defendants and any transaction occurring between the defendants and a citizen of Illinois. If such a nexus cannot be established between the website and the cause of action there can be no specific jurisdiction. *Hy Cite*, 297 F. Supp. 2d at 1160.

Finally, the court notes that the Illinois Court of Appeals has recently affirmed on appeal a decision from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois concerning a virtually identical case involving alleged tortious statements made against plaintiffs Tamburo and MBFS on a nonresident defendant's partially interactive website. *Tamburo v. Andrews*, No. 3-06-0347 slip op. at 8 (Ill. App. Ct. June 15, 2007). The circuit court granted the defendant's motion to dismiss on grounds of lack of specific personal jurisdiction, and the court of appeals affirmed. *Id.*

Because plaintiffs have failed to establish a nexus between the defendants' allegedly tortious acts and any commercial transactions between the defendants and Illinois citizens, the court cannot establish specific personal jurisdiction over the defendants.

The "Effects Test"

Next, plaintiffs claim that because the defendants have allegedly committed an intentional tort against Illinois citizens (the plaintiffs) and because the resulting alleged injury occurred in Illinois, this court should exert personal jurisdiction over the defendants. The plaintiffs cite *Vanguard Airlines* as their sole authority for this claim. 262 F. Supp. 2d 898, 911. However, Plaintiffs' reliance on *Vanguard* is misplaced. The intentional tort in *Vanguard* was coupled with a business transaction between the nonresident defendants and an Illinois corporation, involving multiple contacts and connections between the two parties sufficient to establish minimum contacts between the defendants and Illinois. *Id.* at 909-10. No such connections or transactions have been established by the plaintiffs in the instant case.

The Seventh Circuit has spoken directly to this issue in *Wallace v. Herron*: "We do not believe ... that any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff." 778 F.2d 391, 394 (7th Cir. 1985). To do so, continued the court, "would significantly undercut our traditional due-process protection for out-of-state defendants." *Id.* The court continued by saying that the so-called "effects test" is merely another way of establishing the defendant's relevant contacts with the forum state: the defendant must still purposefully avail himself of the privilege of conducting activities within the forum state, and invoking the benefits and protections of its laws. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). And in *Indianapolis Colts, Inc. v.*

Metropolitan Baltimore Football Club Ltd. P'ship, the Seventh Circuit noted that in all other cases which had come to its attention, the defendants had done more than brought about an injury to an interest located in the particular state. 34 F.3d 410, 412 (7th Cir. 1994).

Thus, in *May*, the defendant's website actively conducted business in Illinois, and the defendant had negotiated business arrangements with Illinois entities in addition to the intentional torts alleged, thus establishing sufficient minimum contacts. 409 F. Supp. 2d 1059. In *Bombliss*, the plaintiffs had established minimum contacts emerging from a transaction with the defendants out of which the alleged tortious acts arose. 824 N.E.2d 1181. And in *Euromarket Designs*, minimum contacts arose, *inter alia*, via the defendant's fully interactive retail website displaying the defendant's trademark name and otherwise directing business at Illinois. 96 F.Supp.2d at 840.

As has been discussed *supra*, the plaintiffs have failed to plead facts adequately alleging minimum contacts between the defendants and Illinois. The mere fact that they assert that the defendants have asserted an intentional tort against the plaintiff is insufficient to sustain the exertion of personal jurisdiction.

Conspiracy Jurisdiction

Plaintiffs additionally allege a civil conspiracy between the defendants to drive the plaintiffs out of business. Plaintiffs allege that defendants devised a private mailing list on the Internet Service Provider Yahoo!, Inc., with the email address apdug@yahoo groups.com ("APDUG")[4]. Plaintiffs allege that defendants created the list to coordinate their efforts in attacking plaintiffs and claim that subpoenaed documents obtained by the plaintiffs have revealed allegedly defamatory emails directed at the plaintiffs. Defendant Henry has testified in her affidavit that the purpose of APDUG was for users of the Alfirin pedigree software to discuss technical issues.

Civil conspiracy consists of a combination of two or more people acting with the purpose of accomplishing by concerted action either an unlawful purpose via lawful means or a lawful purpose via unlawful means. *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888, 894 (Ill, 1994) (citing *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 329 (Ill. 1990). To plead successfully facts supporting conspiracy jurisdiction, plaintiffs must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state. *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). Although agreement among the alleged conspirators is an element of a cause of action for civil conspiracy, it does not have the importance it has in criminal conspiracy; an agreement to commit an unlawful act is potentially a crime but it is not a tort. *Adcock*, 645 N.E.2d at 894. Rather, one of the parties must complete an overt act in furtherance of the agreement that is itself either a tort or unlawful. *Id.*

The formation of a private internet discussion group by the defendants is not an illegal act. Any alleged conspiracy formulated by defendants via the discussion group is likewise, in itself, not a sufficient cause of action of civil conspiracy. Presumably, plaintiffs are attempting to argue that the overt acts in furtherance of the conspiracy are the alleged tortious statements made by the defendants on their websites and in the public internet discussion groups email lists. However, as discussed *supra*, the mere assertion of an intentional tort by the plaintiffs coupled with a claim of injury is insufficient to establish minimum contacts with Illinois, and therefore establish jurisdiction. *See Indianapolis Colts*, 34 F.3d at 412. Since the plaintiffs are unable to establish that a substantial overt act was conducted in Illinois (via a demonstration of minimum contacts between the defendants and Illinois), the overt act requirement, and therefore the cause of action, must fail.

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[4] APDUG is an acronym for Alfirin Pedigree Database Users Group.

Sanction Jurisdiction

Finally, plaintiffs claim that defendants Wild and Hayes deliberately attempted to perpetrate frauds upon the court, and such behavior should be a sufficient reason for the court to exert personal jurisdiction. Plaintiffs allege that Ronald DeJongh[5] ("DeJongh"), the owner of Wild, deliberately lied when he stated in his affidavit that Wild had never had a distributor in the United States. DeJongh has since filed an amended affidavit, claiming that he misspoke and had meant to say that he never had a distributor in Illinois. Additionally, plaintiffs accuse Hayes of lying in her affidavit by stating that her websites had been hosted in the United Kingdom since 2003. Hayes disputes this accusation, and stated further in her affidavit that the website had never been hosted in Illinois, a statement that plaintiffs do not contest.

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[5] DeJongh is not named personally as a defendant in this case.

Plaintiffs argue that because Wild and Hayes allegedly lied to the court, the court should exercise personal jurisdiction as a suitable sanction. Plaintiffs cite *Boron v. West Texas Imports, Inc.* as their sole source of law for this claim. 680 F. Supp. 1532 (S.D.Fla 1988). Leaving aside the fact that that case is not controlling in this jurisdiction, *Boron* is distinguishable from the instant case. In *Boron*, the defendants misrepresented the truth about their contacts *with the forum state* in an effort to avoid jurisdiction. *Id.* at 1535-36. Thus, even if no misrepresentation had been made to the court, personal jurisdiction would have been proper. No such misrepresentation is alleged by the plaintiffs in this case: plaintiffs do not contend that Wild or Hayes had actual contact with the state of Illinois with respect to the subject matter of the alleged cause of action in this case and then attempted to conceal those facts. Even if Wild and Hayes made misrepresentations to the court concerning jurisdictional issues that were not related to Illinois contacts (and that claim is controverted by the defendants) the court cannot simply conjure personal jurisdiction out of the thin air to use as a sanction. Absent minimum contacts with Illinois, due process requirements prevent this court from exerting personal jurisdiction over the Wild and Hayes.

Conclusion

For the reasons described above, the court finds that it does not have personal jurisdiction over the defendants, and their motion to dismiss is granted. The court therefore need not analyze whether plaintiffs failed to state a claim upon which relief can be granted as required by Federal Rule of Civil Procedure 12(b)(6) and the defendants motion to dismiss for that reason is denied as moot.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: October 9, 2007

AO 450(Rev. 5/85)Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 04 C 3317

[Filed October 9, 2007]

Tamburo)
)
v.)
)
Dworkin, et al)
)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion to dismiss plaintiffs' sixth amended complaint for lack of personal jurisdiction is granted. Civil case terminated.

Date: 10/9/2007

Michael W. Dobbins, Clerk of Court

/s/ Rhonda Johnson, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 3317
Judge Joan B. Gottschall

[Filed June 24, 2005]

JOHN F. TAMBURO, D/B/A MAN'S)
BEST FRIEND SOFTWARE)
)
Plaintiff,)
)
v.)
)
STEVEN DWORKIN, KRISTEN)
HENRY, ROXANNE HAYES,)
KAREN MILLS, WILD)
SYSTEMS PTY. LTD, an)
Australian corporation,)
)
Defendants.)
)

ORDER

Plaintiff John F. Tamburo d/b/a Man's Best Friend Software ("MBFS") has sued four individuals and an Australian corporation under numerous legal theories for losses MBFS allegedly incurred arising out of disputes as to ownership of the contents of online dog pedigree databases. Presently before the court is the defendants' joint motion to dismiss MBFS's third amended complaint, which argues among other things that Tamburo–who is proceeding *pro se*–is not the real party in interest. Although MBFS currently is a d/b/a for Tamburo as an individual, MBFS operated as an Illinois corporation, Versity Corp. ("Versity"), for the time periods at issue in the complaint.[1] Tamburo was the president, CEO and sole shareholder of Versity prior to its dissolution, which occurred around the time that this action was filed.

The third amended complaint alleges the following facts relevant to this motion. MBFS designs and sells software for use by animal breeders. One of MBFS's products is The Breeder's Standard .NET ("TBS.NET"), a program accessed via an internet web browser that provides paying customers with access to dog breeding and pedigree information stored in a database. Defendants Steven Dworkin, Kristen Henry, Roxanne Hayes and Karen Mills (the "individual defendants") also operate websites that provide access to dog pedigree databases, but those websites apparently are not-for-profit ventures that offer access to their databases free of charge.

Tamburo wrote a computer program that automatically retrieved the pedigree information provided by the individual defendants' websites, removed the formatting, and imported that information into MBFS's TBS.NET product. According to the complaint, none of the individual defendants' websites employed any of the commonly accepted methods for disallowing access to the websites by automated programs or "robots"[2] such as the one deployed by MBFS. Nevertheless, the individual defendants voiced their displeasure that MBFS extracted the pedigree information from their databases and incorporated it into a commercial product. At least some of the individual defendants accused MBFS of theft of their respective database information on websites, internet discussion forums, or emails sent to multiple individuals, and also called for a public boycott of MBFS products. Examples of the complained of language are as follows:

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[1] The court takes judicial notice of the fact that Versity was incorporated before any of the activities alleged in the third amended complaint took place.

- "MBFS (The Breeders [*sic*] Standard) purposefully and willfully stole the Pedigree Databases of many breeds, including this one, using a data mining robot. They are now offering access to the data for use at $9.95/month from their site."
- "Man's Best Friend Software aka The Breeders [*sic*] Standard has 'harvested' the information contained in the Poodle Pedigree database and other privately maintained online databases without permission and is SELLING this information on their web site. I call on MBFS to make this information available FREE to

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[2] A "robot," in this context, is a computer program designed to traverse a website automatically, recursively retrieving all documents referenced by the website. *See* The Web Robots FAQ, http://www.robotstxt.org/wc/faq.html.

everyone, since the company maintains that the 'stolen' data is not copyright protected and free for the taking. Until this data is made available FREE to everyone PLEASE BOYCOTT MBF/TBS"

- "If you have submitted info to the Cavaliers Online database over the years and resent the fact that someone would steal your information and publish it on a paid website without your permission, please complain by email or phone to MBFS['s] owner: John F Tamburo ... Versity Corporation"

- "Breeders [*sic*] Standard has stolen my Schipperke database and is offering it as a perk if you buy their software. Schipperke people, you don't need that perk, as you already have my site to use for free ... I am asking the Schipperke fancy to complain loudly to MBFS. Why should I do all this work so MBFS can steal it and sell their software with this stolen perk?"

According to the complaint, MBFS sustained substantial economic harm as a result of these statements.

Some of MBFS's theories of liability are predicated on the individual defendants' alleged relationship with defendant Wild Systems Pty. Ltd. ("Wild"), a software company whose products compete with MBFS's offerings. At least some of the individual defendants advocate the use of Wild's "Breedmate" software and advertise Breedmate on their websites. In addition, Wild's president maintains an electronic "Breedmate

User Group" discussion forum where much of the conduct complained of by MBFS allegedly occurred. According to the complaint, Wild worked in concert with the individual defendants to damage MBFS by falsely accusing MBFS of theft and by encouraging dog owners to request that their pedigree information be removed from MBFS's products. MBFS's nineteen count complaint seeks a declaratory judgment that the contents of the individual defendants' databases were facts not subject to copyright protection and that the copying of the database contents was otherwise permissible, and also charges the defendants with extortion, defamation, tortious interference with prospective business relationships, unfair competition, violation of federal and Illinois antitrust laws, and civil conspiracy.

Defendants argue that Versity, rather than Tamburo as an individual, is the real party in interest in this suit because "all of the actions alleged in the complaint arise from conduct initiated by Versity" and the context of the allegedly defamatory or otherwise unprivileged statements makes clear that the statements referenced MBFS as a business. The court agrees. The complaint and its numerous exhibits illustrate that Tamburo was acting as an agent of Versity, and each count with the exception of the request for declaratory judgment stresses the alleged harm to MBFS's business interests. Because Versity is the real party in interest, defendants urge the court to dismiss this action or, in the alternative, require amendment to reflect Versity as plaintiff. Defendants' request is motivated at least in part by the fact that Tamburo is proceeding *pro se*, which is a privilege not afforded to corporations. *See, e.g., Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985).

Tamburo does not dispute defendants' contention that Versity was the real party in interest for the time periods relevant to the complaint or that the suit was brought in his own name for purposes of appearing *pro se*. Rather, Tamburo argues that he currently has standing to bring this action because Versity was voluntarily dissolved and he is the successor to all of Versity's rights and assets, including causes of action.[3] However, as set forth below, the assignment of Versity's claims to Tamburo does not excuse the requirement that those claims be prosecuted through a duly licensed attorney.

As an initial matter, despite Tamburo's assertion that Versity "no longer exists," Versity is not incapable of pursuing this case in its own name merely because it has been dissolved. Corporations may remain in existence for a period of time after dissolution for the purpose of pursuing and defending litigation. As the Supreme Court explained: "[A] time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing." *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949). Illinois has such a "corporate survival" statute, which provides that "the dissolution of a corporation ... shall not take away nor impair any civil remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name." 805 ILCS 5/12.80.[4]

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[3] The "Contract of Transfer" assigning Versity's rights and assets to Tamburo provides that Versity "assigns to [Tamburo] all of its rights and liabilities in litigation, whether or not suit has been filed, including all rights to collective punitive damages and any other amount that, but for this assignment, would be due to Versity and/or inure to its benefit." Pl.'s Resp. Ex. 41 at ¶ 4.

If Versity had brought these claims in its corporate name, it would have been required to appear by counsel. *Scandia Down*, 772 F.2d at 1427; *Strong Delivery Ministry Association v. Board of Appeals*, 543 F.2d 32, 33-34 (7th Cir. 1976). The rule that corporations may not appear *pro se* is "venerable and widespread." *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d. Cir. 1983) (collecting cases). Because a corporation, out of necessity, must be represented by a natural person in court, there are strong policy reasons for requiring that person to be an attorney. Among other things, "the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, *e.g.*, to avoid litigating unfounded or vexatious claims." *Id.*

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[4] Tamburo cites 805 ILCS 5/12.30, setting forth the effect of corporate dissolution, for the proposition that "dissolution of a corporation terminates its corporate existence"; however, this section also provides that "[d]issolution of a corporation does not ... [p]revent suit by or against the corporation in its corporate name." 805 ILCS 5/12.30(c)(4)

Circumventing the rule that a corporation must appear by counsel by assigning a corporation's claims to a non-lawyer is a practice which federal courts have repeatedly disapproved. *See, e.g., Jones,* 722 F.2d at 23 (assignment to CEO and sole shareholder); *Nat'l Indep. Theatre Distribs., Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 610-11 (11th Cir. 1984) (assignment to sole shareholder of dissolved corporation); *Capital Group, Inc. v. Gaston & Snow*, 768 F. Supp. 264 (E.D. Wisc. 1991) (assignment to president and sole shareholder). As the Second Circuit has explained, "[t]o allow [the lay individual] to appear *pro se* ... would be allowing him to flout a well-established and purposeful public policy by means of a procedural device. [The lay individual] chose to accept the advantages of incorporation and must now bear the burdens of that incorporation; thus, he must have an attorney present the corporation's legal claims." 722 F.2d at 23 (quoting *Mercu-Ray Industries, Inc. v. Bristol-Myers Co.*, 392 F. Supp. 16, 18-20 (S.D.N.Y. 1974)). Because Versity can still bring claims in its own name, the fact that Versity has been dissolved does not change this analysis. *See, e.g., Nat'l Indep. Theatre Distribs.*, 748 F.2d at 610-11; *Finast Metal Prods., Inc. v. United States*, 12 Cl. Ct. 759, 761-63 (1987).[5]

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[5] Tamburo also maintains that, '[d]ue mainly to the defendants' trumped-up 'theft' charges, and their well-planned campaign to damage this company and promote the competitor who was helping them do this, I am unable to afford an attorney to prosecute this litigation." Pl.'s Resp. Ex. 40 ¶ 17. However, the argument that allegations of poverty entitle a corporation to appear *pro se* has been rejected by other courts, including a court in this circuit. *See, e.g., Glaston & Snow*, 768 F. Supp at 265; *Woodford Manufacturing Co. v. A.O.Q., Inc.*, 772 F.2d 652, 654

Although Tamburo is a frequent litigant in the Northern District of Illinois,[6] he is not an attorney, and his performance in this action to date underscores why the court should require Versity's claims to be brought by counsel. Tamburo's filings are numerous and often duplicative, contain mistakes of law and *ad hominem* invective, and baselessly charge defendants' counsel with making frivolous arguments, including the argument presently before the court. The court infers from these shortcomings no deliberate attempt to mislead the court or the defendants, but it is clear Tamburo lacks the detachment and professional skill appropriate to the efficient conduct of this litigation. In addition, this suit may raise novel and highly complex issues regarding the scope of property rights in electronic content accessed over the Internet, and the court would be extremely burdened were it forced to decide these issues without the assistance of competent counsel for all parties.

For the reasons set forth above, MBFS's third amended complaint is dismissed without prejudice. MBFS may reinstate this litigation by filing an amended complaint signed by an attorney admitted to practice before this court within 45 days from the date

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(Col. App. Ct. 1989). *See also Rowland v. CA Men's Colony*, 506 U.S. 194, 201-03 (1993) (rejecting argument that a corporation may proceed *in forma pauperis* upon the requisite proof of its indigency).

[6] *See, e.g., Tamburo v. eBay Inc.*, No. 02 C 5292 (N.D. Ill.); *Tamburo v. Current Credit, Inc.*, No. 00 C 1596 (N.D. Ill.); *Tamburo v. Dawn Treaders Inc.*, No. 99 C 4565 (N.D. Ill.); *Tamburo v. Duncan*, No. 96 C 4837 (N.D. Ill.); *Tamburo v. Calvin*, No. 94 C 5206 (N.D. Ill.).

of issuance of this order. Any future pleadings, motions, or any other papers filed on behalf of the plaintiff in this litigation likewise shall be signed by an attorney admitted to practice before this court.

ENTER:

/s/
Joan B. Gottschall
United States District Judge

Dated: June 24, 2005

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Supreme Court, U.S.
FILED

OCT - 4 2010

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No. 10-61

In The
Supreme Court of the United States

STEVEN DWORKIN, KRISTEN HENRY,
ROXY HAYES, and KAREN MILLS,
Petitioners,

v.

JOHN F. TAMBURO,
doing business as MAN'S BEST FRIEND
SOFTWARE, and VERSITY CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Petitioners have presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion reversing the District Court's dismissal for want of personal jurisdiction, after careful analysis of the *Calder v. Jones* factors, does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

AFFILIATION STATEMENT

Respondent Versity Corporation, a dissolved Illinois corporation, was wholly owned by Respondent John F. Tamburo, and has no subsidiaries or affiliated companies.

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COUNTERSTATEMENT[1]

Respondent Tamburo, doing business as Man's Best Friend Software, lives and operates his business in Illinois. He designs software for use by dog breeders and noncommercial dog enthusiasts. One of his products, an online database called The Breeder's Standard, provides customers with access to dog-pedigree information. To create the database, Tamburo developed an automated computer program that scanned the Internet for information about dog pedigrees. He then incorporated the data he retrieved into The Breeder's Standard.

Petitioners Kristen Henry, Roxanne Hayes, Karen Mills, and Steven Dworkin are proprietors of public websites that provide free access to dog-pedigree information. Henry, a Colorado citizen and resident, also breeds and shows dogs. Hayes, a Michigan citizen and resident, raises, shows, and "places" dogs but does not commercially breed them. Mills, a citizen and resident of Ohio, raises and shows dogs. Dworkin, a Canadian citizen who resides in Ottowa, also raises and shows dogs. [2]

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[1] The Petitioners' statement of facts is argumentative, incorrect and incomplete. The factual statement provided by the Respondents is taken directly from the "Background" summary set forth by the Seventh Circuit in the opinion below. *See generally* Pet. App. 4a – 6a.

[2] Dworkin died in 2008 while the Respondents' appeal was pending before the Seventh Circuit. Petitioners' attorney now represents Dworkin's estate in this litigation.

Tamburo pulled some of the information included in The Breeder's Standard from the websites operated by Henry, Hayes, Mills, and Dworkin. In retaliation Henry, Hayes, and Mills posted statements on their websites accusing Tamburo of "theft," "hacking," and "selling stolen goods," and calling on readers to boycott his products. They also posted Tamburo's Illinois address on their websites and urged readers to contact him to harass him and otherwise complain.

Dworkin retaliated in a different way. He emailed Tamburo and demanded that he remove the "blatent [sic] theft of data" from The Breeder's Standard "within 5 days." If Tamburo failed to do so, Dworkin threatened to "publish to each and every dog[-]based list the sleazy methods" of Tamburo's operation. When Tamburo did not comply, Dworkin emailed "all persons who had a free online database of dog pedigrees on the Internet" saying that Tamburo's product contained pedigree data that was "stolen," "mined," and "harvested" for improper "commercial use," and suggested that all proprietors of online dog-pedigree databases "band together to stop this theft" of their data.

The fifth defendant was Wild Systems Pty Ltd., an Australian software company that offers a pedigree software program called Breedmate. Wild Systems also runs a private online Yahoo! email listserve for customers who have purchased the Breedmate software. Ronald DeJong, the owner and president of Wild Systems, manages this email list and must approve any message sent to it. The individual defendants sent DeJong messages for posting on the Breedmate listserve; these messages, like the others, protested that Tamburo had stolen their data.

DeJong in turn transmitted these messages to the Breedmate listserve. Later, DeJong and the individual defendants organized a closed Internet chat group - called the "APDUG Group"[3] - for users of Alfirin software, a product used to manage dog-pedigree databases. In messages posted to the APDUG Group, the individual defendants again accused Tamburo of "theft," "selling stolen goods," and "hacking."

Respondent Tamburo filed suit in the United States District Court for the Northern District of Illinois, *pro se*, on May 11, 2004. In 2005, Respondent Versity Corporation, although dissolved, was added to the lawsuit[4] and Mr. Ian Brenson undertook to represent the Respondents.

On October 9, 2007, the District Court granted Petitioners' motion to dismiss the case for lack of personal jurisdiction. (Pet. App. 42a-65a). The Respondents moved to transfer the case to the Western District of Michigan, Petitioner Hayes' home district. That motion was denied on May 9, 2008. (Pet. App. 33a-41a).

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[3] "APDUG" stands for Alfirin Pedigree Database Users Group.

[4] Versity appears as a plaintiff by virtue of 805 ILCS 5/12.80, the Illinois statute authorizing post-dissolution survival of actions.

The Respondents timely appealed to the Court of Appeals for the Seventh Circuit. The panel, consisting of Circuit Judges Bauer, Kanne and Sykes, issued a unanimous opinion, reversing the dismissal for lack of jurisdiction against four of the defendants and remanding the case for further proceedings. *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010). (Pet. App. 1a-32a).

The Petitioners filed the instant petition on July 7, 2010, and Respondents waived response on July 14, 2010. This Court called for a response on September 2, 2010.

REASONS FOR DENYING THE PETITION

The Petitioners have presented no compelling reasons for their Petition for Writ of *Certiorari* to be granted. First, the Seventh Circuit properly analyzed the facts of this case pursuant to the framework provided by *Calder v. Jones*, which is the most suitable existing standard, and determined that the exercise of personal jurisdiction over the four remaining defendants would be proper, even under the most restrictive and rigorous interpretation of relevant law.

Second, the circuit "splits" that the Petitioners attempt to highlight are illusory. In fact, they are the result of a serious misreading of the Seventh Circuit's opinion below. The involvement of this Court is simply not necessary at this time.

I. This Court Should Deny Certiorari Because The Alleged Facts Fit Squarely Within The Seventh Circuit's *Calder* Analysis.

In *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), a unanimous panel of the Seventh Circuit painstakingly reviewed both the Petitioners' egregious tortious conduct, directed at the forum state, and the significant injuries suffered by the Respondents in that state. In so doing the Seventh Circuit demonstrated that this case is a textbook example of jurisdictional contacts ample enough to satisfy even the most rigorous scrutiny. Relying upon this Court's precedent in *Calder v. Jones,* 465 U.S. 783 (1984), the Seventh Circuit found that the alleged jurisdictional facts "suffice[d] to establish personal jurisdiction over these defendants under either a broad or a more restrictive view of *Calder*." *Tamburo*, 601 F.3d at 706.

The court below summarized the relevant facts upon which it based its analysis:

> Dworkin, Henry, Hayes, and Mills are each alleged to have published false and defamatory statements about Tamburo, either on their public websites or in blast emails to other proprietors of online dog-

> pedigree databases. In some of these messages, readers were encouraged to boycott Tamburo's products; in others, Tamburo's Illinois address was supplied and readers were urged to contact and harass him. The complaint also alleges that Dworkin personally contacted Tamburo by email, accusing him of "theft" and demanding that he remove the "stolen" data from The Breeder's Standard. Dworkin threatened to expose Tamburo's "theft" to the online dog-pedigree community if he did not comply. Dworkin, Henry, Hayes, and Mills engaged in this conduct with the knowledge that Tamburo lived in Illinois and operated his business there; their affidavits do not deny this. Thus, although they acted from points outside the forum state, these defendants specifically aimed their tortious conduct at Tamburo and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there.

Tamburo, 601 F.3d at 706.

The starting point for the Seventh Circuit's analysis was the "express aiming" requirement set forth in *Calder.* First, the court below noted that "[t]he circuits are divided over whether *Calder's* 'express aiming' inquiry includes *all* jurisdictionally relevant intentional acts of the defendant or only those acts that are intentional *and* alleged to be tortious or otherwise wrongful." *Id.* at 704 [emphasis retained]. Noting a potential split on this issue between the Third and Tenth Circuits, the Seventh Circuit recognized that

> [w]e need not take sides in this debate. Tamburo alleges that the individual defendants intentionally published defamatory statements on their websites or in blast emails. He further alleges that this conduct tortiously interfered with his business, constituted a trade libel, and that the defendants entered into a conspiracy to commit these wrongful acts against him. These are intentional-tort allegations, bringing this case squarely within the *Calder* formula even if the scope of the inquiry is more narrowly focused on the alleged tortious acts.

Id.

Second, the Seventh Circuit addressed the tension between two predecessor cases in its own circuit, which had differing views as to whether the *Calder* test should be applied broadly or restrictively, *Janmark v. Reidy,* 132 F.3d 1200 (7th Cir. 1997), and *Wallace v Heron*, 778 F.2d 391 (7th Cir. 1985). *Wallace* had been the authority relied upon by the District Court in dismissing the instant case. The Seventh Circuit tightened its interpretation of the "effects test," finding that the broad standard laid down by Judge Easterbrook in

Janmark, which had been read to require only a forum state injury, still required "something more." *Tamburo,* 601 F.3d at 705, n.8.

The Seventh Circuit went on to cite with approval *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 412 (7th Cir. 1994), and its conclusion that "the defendant had done more than brought about an injury to an interest located in a particular state." The Seventh Circuit analyzed its broad holding in *Janmark* and reconciled it to *Indianapolis Colts* and *Wallace,* concluding that,

> [b]oth *Wallace* and *Indianapolis Colts* read *Calder* to require a forum-state injury *and* "something more" directed at that state before jurisdiction over a foreign defendant may be considered proper. Importantly, however, the holding in *Janmark* ultimately focused on more than the fact that the injury had occurred in Illinois; *Janmark's* jurisdictional conclusion was premised on the Illinois-based injury and the fact that the defendant acted with the purpose of interfering with sales originating in Illinois. Thus, despite its broad language about *Calder*, *Janmark* ultimately considered the relationship between the allegedly tortious conduct and the forum state itself.

Tamburo, 601 F.3d at 705-06.

Finally, turning to whether Respondents' injury arises out of the Petitioners' contacts with the forum state, as required by *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Seventh Circuit noted a circuit split, but concluded that,

> [u]nder even the most rigorous approach to the determination of whether the plaintiff's injury "arises out of" the defendant's contacts with the forum state, Tamburo's injury clearly does. We have already concluded that Dworkin, Henry, Hayes, and Mills expressly aimed their allegedly tortious conduct at Tamburo and his Illinois-based business for the purpose of causing him injury there; these "contacts" with the forum state are the cause in fact and the legal cause of Tamburo's injury. That is, Tamburo's claims arise directly out of the individual defendants' contacts with Illinois.

Tamburo, 601 F.3d at 709.

Significantly, the Seventh Circuit chose not to adopt the standard set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), urged upon it by the Petitioners, in this intentional tort case. In *Zippo*, an Internet domain name dispute, the District Court proposed a test to determine minimum contacts to support personal jurisdiction according to a sliding-scale. In such cases, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." 952 F. Supp at 1124.

Citing *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004), the court below reasoned,

> As a more general matter, we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet.

Tamburo, 601 F.3d at 703, n.7. In *Hy Cite*, the Western District of Wisconsin dismissed on the motion of the Arizona-based defendants for a lack of the "express aiming" required by *Calder*. 297 F. Supp. 2d at 1165-66. The *Hy Cite* court rejected the *Zippo* standard, finding that:

> [I]n *Zippo*, the court did not explain under what authority it was adopting a specialized test for the internet or even why such a test was necessary. The Supreme Court has never held that courts should apply different standards for personal jurisdiction depending on the type of contact involved. To the contrary, the Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests." The purpose of the "minimum contacts" test set forth in

> *International Shoe* was to create a standard flexible enough that specialized tests were not needed.

Hy Cite, 297 F. Supp. 2d at 1160 (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

This court has created a well-reasoned and timeless standard in *Calder*. *Zippo* incorrectly concentrates on the *medium* by which a tort is transmitted, instead of relying on the relationship between the tortfeasor and the forum state. In so doing, the "*Zippo* test" needlessly complicates jurisdictional analysis. Moreover, the use of a non-specialized test is preferable to the limited and specialized test set forth in *Zippo*:

> As [the Chief Judge of the Seventh Circuit] has observed in the context of writing about technology, specialized tests are often "doomed to be shallow and to miss unifying principles . . . [T]he best way to learn the law applicable to specialized endeavors is to study general rules."

Hy Cite, 297 F. Supp. 2d at 1160 (*citing* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. Chi. Legal F. 207 (1996)).

The Seventh Circuit unanimously utilized the appropriate analytical framework set forth in *Calder* for its jurisdictional analysis. It did not need to go beyond this framework to decide that the exercise of personal jurisdiction over the Petitioners was proper. It addressed any apparent conflicts, whether within its own circuit or with other circuits, and reconciled them. The court found that the Petitioners' tortious acts expressly aimed into the forum state satisfied even the strictest jurisdictional analysis. The Seventh Circuit properly recognized the "something more" that is required for minimum contacts, and found it in the facts of this case. Thus, this case is not a suitable candidate for this court's review.

II. Petitioners' Illusory Conflict Between The Circuits Results From A Misreading Of The Seventh Circuit's Opinion Below.

A. The "Split" Between The Seventh And Fifth Circuits Is Illusory.

In their submission, the Petitioners attempt to argue that *Revell v. Lidov,* 317 F.3d 467 (5th Cir. 2002), conflicts with the Seventh Circuit's opinion in this case. Pet. 15-19. The Petitioners' fundamental misreading of the *Tamburo* opinion lies at the heart of their incorrect claim that a circuit conflict exists on the issue of what is required for the exercise of personal jurisdiction in an online intentional tort setting.

In *Revell*, the plaintiff sued Lidov and Columbia University for publishing an allegedly defamatory article on Columbia's "BBS" web site in New York. The *Revell* court affirmed the Texas District Court's dismissal of the case pursuant to FED. R. CIV. P. 12(b)(2), because the plaintiff's injury, standing alone, was insufficient to constitute minimum contacts for personal jurisdiction. The Fifth Circuit stated:

> We find several distinctions between this case and *Calder* — insurmountable hurdles to the exercise of personal jurisdiction by Texas courts. First, the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California. This conclusion fits well with our decisions in other intentional tort cases where the plaintiff relied upon *Calder*. In those cases we stated that the plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction under *Calder*.

Revell, 317 F.3d at 473.

The Petitioners seize on the facts of the *Revell* case to point up what they see as a contrast with those in the instant case. If the Seventh Circuit had indeed interpreted *Calder* to require nothing more than an injury occurring in the forum state, there might have been some validity to their argument. However, the holdings in *Revell* and the instant case are entirely consistent. Had the Fifth Circuit (or any other Circuit) addressed the factual allegations in this case, it would have reached the same conclusion as the Seventh Circuit, which is that the exercise of personal jurisdiction is appropriate and satisfies due process.

Where the *Revell* court noted that "the article ... contains no reference to Texas," the Seventh Circuit noted that "Tamburo's Illinois address was supplied and readers were urged to contact and harass him." Where the *Revell* court noted, "nor does it refer to the Texas activities of Revell," the Seventh Circuit noted that "Dworkin, Henry, Hayes, and Mills engaged in this conduct with the knowledge that Tamburo lived in Illinois and operated his business there." *Revell*, 317 F.3d at 473; *Tamburo*, 601 F.3d at 706.

> Knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test. The defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court

> in that forum, as *Calder* itself and numerous cases from other circuits applying *Calder* confirm.

Revell, 317 F.3d at 475-76; *see also Tamburo,* 601 F.3d at 707 (*citing Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008)) ("[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder's* express-aiming requirement").

The "effects test," utilized by the Seventh Circuit is consistent with case-law from the Third, Ninth and Tenth Circuits. The test set forth in the opinion below has been adopted as a standard for other courts:

> *Calder* thus suggests three requirements for personal jurisdiction in this context: (1) intentional conduct (or "intentional and allegedly tortious" conduct); (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the effects would be felt-that is, the plaintiff would be injured-in the forum state.

See, e.g., Baldwin v. Fischer-Smith, 315 S.W.3d 389, 393 (Mo. App. 2010) (*citing Tamburo,* 601 F.3d at 703).

The Petitioners are simply wrong when they argue that the Fifth Circuit and Seventh Circuit rely upon conflicting interpretations of *Calder*.

B. The Seventh Circuit, In Harmony With Its Sister Circuits And Supreme Court Precedent, Requires More Than Mere Injury In The Forum State To Consider Tortious Conduct "Expressly Aimed" At The Forum State.

Not only is there a lack of conflict between current case-law in the Seventh and Fifth Circuits, there is simply no conflict between the Seventh and the other Circuits that have analyzed similar facts. Nonetheless, the Petitioners doggedly strive to argue that the Seventh Circuit's decision in *Tamburo* "essentially interpreted the 'expressly aimed' prong to require only that a defendant knows where a plaintiff lives and that an injury occurs in the forum state for that defendant to be brought in to court within the forum state." Pet. 24-25.

As explained in detail in Section I *supra,* the Seventh Circuit found that the Petitioners intentionally targeted Illinois and made it the focal point of the tort when they published the Respondents' Illinois address to incite and coordinate third parties to contact the Respondents and harass them, and when they transmitted extortive threats to the Respondents in Illinois. *Tamburo,* 601 F.3d at 706. "These allegations suffice to establish personal jurisdiction over these defendants under either a broad *or* a more restrictive view of *Calder*." *Id.* [emphasis retained]. The Seventh Circuit noted that "[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder's* express-aiming requirement." *Id.* at 707. This is entirely consistent with the supposedly conflicting series of cases cited by the Petitioners. Only by misreading the holding in *Tamburo* can the Petitioners concoct a conflict amongst the Circuits.

Thus, the Petitioners' attempt to argue that the Seventh Circuit's holding in the instant case is at odds with that of the Third Circuit in *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998, a case where the Third Circuit laid out the *Calder* requirements in almost identical language to that used in by the Seventh Circuit. That court emphasized that "the forum was the focal point of the tortious activity in the sense that the tort was 'expressly aimed' at the forum. Essential was a corollary finding that the defendants knew that the "brunt" of the injury caused by their tortious acts would be felt by the plaintiff in the forum." *IMO*, 155 F.3d at 261.

This is the same standard utilized by the Seventh Circuit in *Tamburo*, when faced with a fact pattern demonstrating that the forum was the focal point of the tort – the Respondents were an Illinois citizen and an Illinois corporation. The Petitioners "expressly aimed" their tortious activity into Illinois by coordinating and inciting third-parties to contact the Respondents in Illinois to harass them, supplying them with the Respondents' Illinois contact information. *Tamburo,* 601 F.3d at 697.

The Petitioners highlight *IMO's* criticism of *Janmark*; however, the Seventh Circuit had already discussed this in the instant case, noting that "despite its broad language about *Calder*, *Janmark* ultimately considered the relationship between the allegedly tortious conduct and the forum state itself." *Tamburo,* 601 F.3d at 706, n.8. Rather than aggravating or even maintaining a circuit split, the Seventh Circuit reined in overbroad interpretations of *Janmark*, thereby resolving superficial differences between the circuits. Indeed, the *Tamburo* court cited *IMO* as a basis for its three-point *Calder* test. *Tamburo,* 601 F.3d at 703. Thus, the Seventh Circuit lined up with the Third and Tenth Circuits and their interpretation of *Calder's* "effects test."

The Petitioners next contend that *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), "directly conflicts with the Seventh Circuit decision below." The Petitioners allege that their conduct, as in *ESAB*, "has been directed throughout the United States." Pet. 29. However, this is disingenuous in the extreme. The Petitioners assembled and directed their efforts at *Illinois*. Their efforts were designed to collect the efforts of third parties from across the world and aim them into Illinois, with the specific intention of causing harm to a citizen of and business in Illinois. They expressly targeted the forum, circulating the Respondents' Illinois contact information along with their entreaties to harass the Respondents. In so doing, they aimed their libelous and otherwise unlawful activities directly at the Respondents in Illinois.

This is in stark contrast to the facts in *ESAB,* where the court found that "[t]he only South Carolina 'contact' related to this suit is that Centricut and Aley knew that the sales leads that Bergen supplied might, if fruitful, ultimately result in less sales to the ESAB Group, which was headquartered in South Carolina." *ESAB,* 126 F.3d at 626. The *ESAB* defendants' acts were not focused on South Carolina, whereas the Petitioners' acts in this case were aimed like a laser at Illinois, and expressly intended to cause injury there.

"[A]lthough the place (of injury) is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld." *Id.* The opinion below described the strong contacts between the Petitioners and Illinois, and found jurisdiction accordingly. The Seventh Circuit's decision in this case is consistent with the holding in *ESAB;* the opinion below even cites *ESAB* as representing a more restrictive view of *Calder*. *Tamburo,* 601 F.3d at 704. However, the court held that the Petitioners' contacts with Illinois "establish personal jurisdiction over these defendants under either a broad or a more restrictive view of *Calder*." *Id.* at 706.

Next, the Petitioners cite a Ninth Circuit case, *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000) (*overruled in part on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207 (9th Cir. 2006)) (en banc), as developing the theme of *ESAB*. However, *Bancroft* was also decided consistently with the case below.

This Court need look no further than the Petitioners' own submission, which ironically makes the Respondents' own argument by describing similar facts to those at hand. "The Ninth Circuit found the test met when the letters sent by ANI were expressly aimed at Bancroft, targeted them individually as a business in California, and ANI knew that the effect of their letters would be felt in California. *Id.* at 1088." (Pet. 30). *See Tamburo*, 601 F.3d at 706 (the Petitioners orchestrated and encouraged third parties to harass the Respondents in their home state, after writing directly to them in Illinois to threaten with a campaign of defamation as retaliation for the Respondents' lawful activities).

Finally, the Petitioners attempt to create a conflict, where none exists, between the Seventh Circuit and the Tenth Circuit arising from that court's decision in *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008). (Pet. at 30-31). This is really a stretch, given that the *Tamburo* court cited *Dudnikov* favorably, discussing it at some length. *Tamburo*, 601 F.3d at

707-08. Contrary to the Petitioners' arguments, the Seventh Circuit did not disagree with *Dudnikov,* but found that "[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder's* express-aiming requirement. *Id.*; *see Dudnikov,* 514 F.3d at 1076 ("Defendants' express aim in acting was to halt a Colorado-based sale by a Colorado resident, and neither the lack of defendants' physical presence in Colorado nor the fact that they used a California-based entity to effectuate this purpose diminish this fact").

Contrary to the Petitioners' assertions that the circuits are in conflict, the different circuits have utilized the *Calder* test across the board. Recently, the Eleventh Circuit has come down the same way:

> These allegations satisfy the Calder effects test for personal jurisdiction—the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum. The Constitution is not offended by the exercise of Florida's long-arm statute to effect personal jurisdiction over Lovelady because his intentional conduct in his state of residence was calculated to cause injury to [Plaintiff] in Florida.

Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008).

In sum, there is neither truth nor substance to the Petitioners' arguments. The Seventh Circuit has not struck out on its own with an aberrant decision that requires correction. The unanimous court in *Tamburo* issued an opinion that carefully analyzed the facts and applied this Court's existing precedent to those facts to find a clear case for the exercise of personal jurisdiction over non-resident defendants. The opinion below was consistent with the interpretation of other circuits that have examined similar jurisdictional issues.

The analysis in *Calder* is vital and timeless. Courts that have addressed the issue of personal jurisdiction in the Internet Age have found that *Calder* provides a flexible and useful framework to aid in their inquiries. There is simply no reason to visit this issue at this time. The Petitioners have presented no compelling reasons for their Petition for Writ of *Certiorari* to be granted.

CONCLUSION

The Petitioners have not established any compelling reasons for this Court to grant their Petition. Therefore, the Respondents respectfully request that their Petition be denied.

Respectfully Submitted,

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